90-1221

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC. and LITTON INDUSTRIES, INC.,

Petitioners

v.

GENERAL ELECTRIC COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§9601 *et seq.*, a voluntary cleanup of property by a private party that

- does not involve an imminent threat of harm to public health or the environment
- spans more than one year and permanently cleans up the property using an unnecessarily expensive remedial alternative and
- is caused solely by the private party's desire to reap a windfall profit and avoid fraud claims by a third party

constitutes a "removal action", enabling the private party to recover its total cleanup costs from a former owner of the property without satisfying the public participation and cost-effectiveness requirements applicable to a "remedial action".

2. Whether a prevailing plaintiff in a private party cost recovery action under Section 107(a) of CERCLA, 42 U.S.C. §9607(a), is entitled to recover its attorneys' fees from a defendant where Congress, in CERCLA, expressly authorized fee-shifting only in Section 104(b) federal government cost recovery actions and Section 310 private party citizens' suits but not in Section 107(a) private party cost recovery actions.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

The parties to the proceeding below were petitioners Litton Industrial Automation Systems, Inc. and Litton Industries, Inc. and respondent General Electric Company. The parent company of petitioner Litton Industrial Automation Systems, Inc. is petitioner Litton Industries, Inc. There are no subsidiaries of petitioners Litton Industrial Automation Systems, Inc. or Litton Industries, Inc. which are not wholly owned.

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LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.
and LITTON INDUSTRIES, INC.,

Petitioners

v.

GENERAL ELECTRIC COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Litton Industrial Automation Systems, Inc. and Litton Industries, Inc. (collectively "Litton" or "petitioners") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned proceeding on December 12, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, *General Electric Company v. Litton Industrial Automation Systems, Inc. and Litton Industries, Inc.*, No. 89-2845, slip op. (8th Cir. 1990), is not yet officially reported and is reproduced in the Appendix at A-1 to A-14. The order of the Eighth Circuit dated January 9, 1991 is not officially reported and is reproduced in the Appendix at A-15.

The opinion of the Honorable Russell G. Clark, United States District Court for the Western District of Missouri, dated

June 20, 1989, is reported at 715 F. Supp. 949 (W.D. Mo. 1989) and is reproduced in the Appendix at A-16 to A-43. The orders of Judge Clark dated August 7, 1989, October 24, 1989 and November 1, 1989 are not officially reported and are reproduced in the Appendix at A-44 to A-55.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1990. On January 9, 1991, the Court of Appeals stayed the issuance of its mandate until February 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 101(23), 101(24), 101(25), 104(b), 107(a), 117 and 310 of CERCLA, 42 U.S.C. §§9601(23), 9601(24), 9601(25), 9604(b), 9607(a), 9617 and 9659; 40 C.F.R. §§300.65, 300.67(d), 300.68 and 300.71 (1985); and 40 C.F.R. §§300.150, 300.155, 300.160, 300.400(c)(1), (4), (5), (7), (e), (g), 300.405(b), (c), (d), 300.410, 300.415(b)(4)(i), (m), 300.420, 300.430(c), (f) (1)(ii)(D), (2), (3), (6), 300.435(c) and 300.700(c)(5), (6) (1990) are set forth in pertinent part in the Appendix at A-56 to A-124.

STATEMENT OF THE CASE

A. Factual Background

In 1959, Royal McBee Corporation ("Royal") opened a typewriter plant on a 40-acre tract of land in Springfield, Missouri. Between 1959 and 1962, residues from the plant's metal plating and heat treating operations were lawfully deposited on a small part of an unused portion of the property. In 1965, Royal merged into Litton, which sold the tract to respondent General Electric Company ("GE" or "respondent") as an industrial property in 1970.

In 1984, GE contracted to sell the property at a large profit to a group of local real estate developers ("Enterprise Park") who intended to upgrade its use from industrial to commercial. Deliberately concealing any information about the residues, GE

represented in the contract of sale that it was not aware of any condition which would render the property unsuitable for commercial development.

In March 1985, GE consummated the sale of the property to Enterprise Park, realizing a profit of $1 million. The Missouri Department of Natural Resources thereafter proposed to place the property on the Missouri Registry of Confirmed, Abandoned, or Uncontrolled Hazardous Waste Disposal Sites (the "Registry"). The Registry provides public notice that certain material is present at a property. Listing a property on the Registry does *not* denote that there is a threat of harm to public health or the environment, nor does registering a property necessarily require anyone to clean it up. Nevertheless, because the proposed registration of the property complicated its development plans, Enterprise Park threatened to file a fraud complaint seeking millions of dollars in damages on the ground that GE knew about the residues when it sold the property.

The 20-year-old residues had never contaminated the groundwater or had any other adverse effect, nor did they present an imminent threat of harm to public health or the environment. The *only* potential risk *ever* identified was the remote possibility that someone might dig in the precise location where residues were buried, uncover them and eat soil containing residues on a continuous basis.

There were remedies far less drastic and far less costly than excavation to prevent the affected soil from being ingested. However, in December 1985, GE and Enterprise Park entered into a Settlement Agreement in which GE, without even considering more cost-effective alternatives, agreed to excavate the soil so that the property would not be listed on the Registry. If GE failed to keep the property off the Registry, it was obligated to repurchase it (forfeiting its $1 million sale profit) plus pay a $1 million penalty to Enterprise Park.[1]

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1. *After* GE committed itself in the Settlement Agreement to excavate the soil, its consultants prepared a report which identified possible remedial alternatives other than excavation. However, GE had previously told its consultants that it considered excavation to be the only viable option. Therefore, the report was tailored to fit this preordained conclusion and did

The excavation of the soil, which was a permanent remedy, spanned more than one year and was an unnecessarily expensive remedial alternative motivated solely by GE's quest for a profit and not to protect the environment. In early 1988, as a result of the voluntary cleanup, the proposed listing of the property on the Registry was withdrawn. Prior to committing to soil excavation in its Settlement Agreement with Enterprise Park, GE failed to provide any opportunity for the public to participate in the selection of a cleanup remedy. It did not solicit public input or hold any public meetings concerning more cost-effective remedial alternatives.

On June 18, 1987, GE instituted the present action against Litton seeking recovery of cleanup costs solely under Section 107(a) of CERCLA, 42 U.S.C. §9607(a). Jurisdiction was founded on 42 U.S.C. §9613 and 28 U.S.C. §1331. On June 20, 1989, after a four-day bench trial, the United States District Court for the Western District of Missouri held Litton liable and subsequently awarded GE $940,843.23 in literally unrestricted cleanup costs, $161,945.65 in prejudgment interest and $419,464.95 in attorneys' fees and expenses. Litton appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed on December 12, 1990. The Eighth Circuit later awarded GE $100,000.00 in attorneys' fees and other costs and expenses relating to the appeal.

B. The Statutory Scheme

1. "Removal Action" versus "Remedial Action"

Section 107(a) of CERCLA permits private parties who incur response costs caused by a release or threatened release of hazardous substances to recover from responsible parties the "necessary costs of response . . . consistent with the national contingency plan [NCP]". 42 U.S.C. §9607(a). The NCP, a set of

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NOTES *(Continued)*

not seriously consider more cost-effective remedial alternatives. Further as a result of the Settlement Agreement and to keep the property off the Registry, GE and Enterprise Park voluntarily entered into a Consent Decree for the cleanup with the Missouri Department of Natural Resources even though no regulatory authority had ever ordered any cleanup of the property.

regulations promulgated by the Environmental Protection Agency ("EPA"), establishes detailed procedures for the selection and implementation of economical and environmentally sound responses. *See* 40 C.F.R. §§300.1 *et seq.*[2]

CERCLA defines two entirely different types of response actions – "removal actions" and "remedial actions" – each of which is governed by distinct NCP requirements. As this Court recognized in *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986), removal actions are short-term responses to immediate environmental threats or emergency situations,[3] while remedial actions are long-term responses which effect a permanent environmental solution.[4] The 1985 NCP classifies government response actions which last longer than six months as remedial actions. 40 C.F.R. §300.65(b)(3).

Since Congress intended that removal actions respond to immediate threats, the applicable NCP provisions are simple and truncated. Remedial actions, by contrast, must comply with more detailed procedural and substantive NCP provisions. In particular, the 1985 NCP does not require that the public be permitted to participate in the private party's choice of removal action. See 40 C.F.R. §§300.65, 300.71(a)(2)(i). However, there must be an opportunity for the public to participate in the

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2. The cleanup in the present case was governed by the version of the NCP which took effect in 1985 ("1985 NCP"). A revised version of the NCP became effective in 1990 ("1990 NCP").

3. A removal action is statutorily defined in pertinent part as: "[T]he cleanup or removal of . . . hazardous substances from the environment, . . . the disposal of removed material, or the taking of such other actions as . . . necessary to . . . mitigate damage to the public health . . . . The term includes . . . without being limited to . . . fencing, . . . provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals. . . ." 42 U.S.C. §9601(23).

4. A remedial action is statutorily defined in pertinent part as: "[C]onsistent with *permanent* remedy taken instead of or in addition to removal actions . . . . The term includes, but is not limited to, such actions . . . as storage, confinement, . . . neutralization, cleanup of . . . contaminated materials, recycling, . . . diversion, destruction, . . . dredging or excavations, . . . [and] onsite treatment. . . . [T]he term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances . . . ." 42 U.S.C. §9601(24)(emphasis added).

private party's selection of a remedial alternative. *Id.* §§300.67(d), 300.71(a)(2)(ii)(D).[5] In addition, private party remedial actions are required to be "cost-effective". *Id.* §§300.68(i)(1), 300.71(a)(2)(ii)(C).[6]

2. Attorneys' Fees

CERCLA does not expressly authorize an award of attorneys' fees to the prevailing plaintiff in a Section 107(a) private party cost recovery action. By contrast, Congress certainly knew how to provide for the recovery of attorneys' fees in two other CERCLA contexts. First, pursuant to Section 104(b), 42 U.S.C. §9604(b), the United States Government is expressly permitted to recover its legal fees in a cost recovery action.[7] Second, pursuant to Section 310, 42 U.S.C. §9659, fee-shifting is explicitly permitted in a citizens' suit brought against the EPA or other

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5. As mandated in the 1985 NCP: "[F]easibility studies that outline alternative remedial measures must be provided to the public for review and comment for a period of not less than 21 calendar days. Such review and comment shall precede selection of the remedial response. Public meeting(s) shall, in most circumstances, be held during the comment period." 40 C.F.R. §300.67(d). Public participation is so seminal to the statutory scheme that in the 1990 NCP, even certain private party removal actions are subject to some public participation provisions. *See* 40 C.F.R. §300.415(m). Those provisions, however, are abbreviated compared to the provisions governing private party remedial actions, which continue to be subject to extensive public participation requirements including the holding of public meetings. *See* 40 C.F.R. §§300.430(c), 300.430(f)(2), (3), (6), 300.435(c), 300.700 (c) (6) (ii).

6. While "cost" is one of the factors to be evaluated in certain private party removal actions under the 1990 NCP, private party remedial actions continue to be subject to an express "cost-effectiveness" mandate. *See* 40 C.F.R. §§300.415(b)(4)(i), 300.430(f)(1)(ii)(D), 300.700(c)(5)(v). Thus, as is the case with the 1985 NCP, the provisions governing removal actions in the 1990 NCP are far less extensive than the provisions governing remedial actions.

7. Section 104(b) of CERCLA provides in pertinent part that "*the President* may undertake such planning, *legal*, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, *to recover the costs thereof*, and to enforce the provisions of this chapter." 42 U.S.C. §9604(b)(1) (emphasis added).

enumerated parties to perform a mandatory legal duty or ensure statutory compliance.[8]

When CERCLA was enacted in 1980, Congress was already on notice of this Court's holdings in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975) and *Runyon v. McCrary*, 427 U.S. 160, 185-86 (1976), that attorneys' fees cannot be recovered absent explicit congressional authorization. Nevertheless, Congress chose to enact Section 107(a) of CERCLA conspicuously devoid of any fee-shifting language, while *at the same time* it enacted Section 104(b) which expressly provides for fee-shifting in federal government cost recovery actions. Further, when as part of the Superfund Amendments and Reauthorization Act of 1986, Congress added Section 310, which expressly permits fee-shifting in private party citizens' suits, it chose not to amend Section 107(a) to permit fee-shifting in private party cost recovery actions.[9]

C. The Court of Appeals Decision

The Court of Appeals found that GE's non-emergent cleanup took "more than a year" and "totally and permanently" cleaned up the property. App. A-8. It further recognized that "CERCLA's definition of remedial action lists excavations as a remedial example, and its definition of removal action does not explicitly mention excavations". App. A-7. The Court of Appeals did not find that the cleanup involved an imminent threat of harm or an emergency situation.

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8. Section 310 of CERCLA provides in pertinent part that "[t]he court, in issuing any final order in any action brought pursuant to this section . . . may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. . . ." 42 U.S.C. §9659(f).

9. Section 107(a) merely permits eligible private parties to recover their "costs of response". As part of the 1986 amendments, the definition of the term "response" in Section 101(25) of CERCLA, 42 U.S.C. §9601(25), was modified to include the words "enforcement activities". However, no reference to attorneys' fees was added, nor was the term "enforcement activities" defined in CERCLA. *See also* pages 17-19 *infra*.

Nevertheless, the Court of Appeals held that the cleanup was a "removal action" as to which the public participation and cost-effectiveness requirements for remedial actions did not apply. Although the question of whether GE's cleanup was a "removal action" or a "remedial action" was outcome-determinative, the Court of Appeals merely observed, based upon a fleeting reference to the NCP, that "an excavation is not beyond the pale of a removal action." App. A-7. The Court relegated the remainder of its discussion to two footnotes. There, it summarily concluded that it was not constrained by this Court's analysis in *Exxon Corp. v. Hunt, supra,* to find that GE's total and permanent cleanup of the property was a remedial action. App. A-8. It further announced that it would not even address the central issue in this case – whether GE complied with the public participation, cost-effectiveness and other requirements applicable to "remedial actions":

> "Having found that GE's response was a removal action, we do not need to reach the issue of whether the response met the NCP remedial action guidelines. Similarly, as Litton's claim that it was denied due process is predicated on the assertion that GE's action was a remedial action, this claim also becomes moot." App. A-10.[10]

Despite this Court's holdings in *Alyeska Pipeline* and *Runyon v. McCrary, supra,* that attorneys' fees cannot be recovered without explicit congressional authorization, the Eighth Circuit held – for the *first time* by a federal court of appeals – that a prevailing plaintiff in a Section 107(a) private party cost recovery action can recover attorneys' fees from a defendant. Rejecting the holdings of the overwhelming majority

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10. The Court of Appeals acknowledged that a private party can recover its response costs "*only* if the response was *necessary* and consistent with the NCP" and that "[i]f the response is deemed to be a remedial action, then it *must* . . . be cost-effective and provide for public comment. . . ." App. A-6 (emphasis added). Nevertheless, holding that the motivation for a cleanup is "irrelevant", App. A-5, the Court totally disregarded the fact that GE's unnecessarily expensive cleanup was motivated solely by its desire to avoid a fraud suit by Enterprise Park and realize a windfall profit.

of federal district courts that such fees are not recoverable, the Court of Appeals strained to find in CERCLA's definition of "response" a "sufficient degree of [statutory] explicitness" to support an award of fees. App. A-13. Nowhere in its result-oriented analysis did the Court even acknowledge that Congress elsewhere in CERCLA (but not in the private party cost recovery section) had expressly provided for the recovery of attorneys' fees.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises Questions of Exceptional Importance Concerning Federal Environmental Law Which Should Be Settled by This Court

The importance of the decision below[11] is highlighted by the participation of the EPA in the Court of Appeals briefing. On appeal, the EPA contended that the District Court's decision "belittles the importance of the public participation contemplated by the NCP". Ironically, by holding that GE's non-emergent cleanup was a "removal action" rather than a "remedial action", the Eighth Circuit accorded the public participation requirement even less significance than had the District Court and effectively wrote a blank check for even the least cost-effective, voluntary and non-urgent cleanups.[12]

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11. The Eighth Circuit's decision has been widely reported in the legal press. *See, e.g.*, 59 U.S.L.W. 1101 (Jan. 8, 1991) (first page of "Summary and Analysis" section); 59 U.S.L.W. 2396 (Jan. 8, 1991); *Haz. Waste Lit. Rep.* (Andrews), Dec. 17, 1990 at 20,172 (lead article); *Env't Rep.* (BNA), vol. 21, no. 34, at 1579-81 (Dec. 21, 1990) (lead article in "Current Developments" section); *Fed. Cont. Rep.* (BNA), vol. 54, no. 25, at 885-87 (Dec. 24, 1990); *Toxics L. Rep.* (BNA), vol. 5, no. 29, at 915-17 (Dec. 19, 1990) (lead article); *Env't L. Rep.* (Env't L. Inst.), vol. 21, no. 2, at 1 (Jan. 21, 1991); *Inside EPA, Env't Policy Alert* (Inside Wash. Pub.), vol. 8, no. 1, at 25 (Jan. 9, 1991); *Inside EPA, Superfund Rep.* (Inside Wash. Pub.), vol. v, no. 1, at 13 (Jan. 2, 1991) (lead article in "Litigation" section); *Lit. Rep.: Superfund* (Mealey), vol. 3, issue 18, at 3-5 (Dec. 26, 1990) (lead article). *See also* Wall St. J., Dec. 14, 1990, at B2.

12. The EPA's ultimate conclusion that the District Court's decision should nevertheless be affirmed was based upon the mistaken belief that GE's

The EPA reemphasized the importance of the public participation requirement just last year. Referring specifically to private party cleanups, the EPA stated:

> "Public participation is an important component of a CERCLA-quality cleanup, and of consistency with the NCP. The public – both PRP's and concerned citizens – have a strong interest in participating in cleanup decisions that may affect them, and their involvement helps to ensure that these cleanups – which are performed without governmental supervision – are carried out in an environmentally sound manner. Thus, EPA has decided that providing public participation opportunities should be a condition for cost recovery under CERCLA." 55 Fed. Reg. 8795 (March 8, 1990).

Cf. Section 117 of CERCLA, 42 U.S.C. §9617 (reflecting congressional recognition of the importance of public participation in government-sponsored cleanups).

Reversal of the decision below is necessary to send a strong and unmistakable message that the public participation component of CERCLA cannot be ignored or avoided by strategy or artifice. Unless there is a reversal, CERCLA's public participation requirements will be severely undermined since a private party will be able to eschew them either entirely or in large measure simply by characterizing a non-emergent, permanent cleanup as a "removal action" – a classification made much easier to attain by the Eighth Circuit's decision.[13]

NOTES *(Continued)*

cleanup was completed "in less than 2 months" and was therefore a "short-term" removal action. In fact, both the District Court and the Court of Appeals found that the non-emergent cleanup spanned more than one year.

13. Indeed, if the cleanup in this case can be considered a "removal action", the definition of a removal action will become so broad that few, if any, cleanups will ever again be classified as remedial. Hence, with respect to cleanups governed by the 1985 NCP, which does not require any public participation in the selection of removal action, the Eighth Circuit's decision effectively eliminates the public participation component from CERCLA. The impact of the Eighth Circuit's decision with respect to cleanups governed by the 1990 NCP is likewise substantial. Under the 1990 NCP, classifying a

Reversal of the decision below will also forcefully discourage private parties from using the Eighth Circuit's "removal action" decision as a device for circumventing the "cost-effectiveness" requirement applicable to remedial actions. The "cost-effectiveness" requirement ensures that scarce resources will be judiciously allocated so as to maximize response capability at the largest number of sites instead of squandering those limited resources at only a few sites. At a time when the national economy can least afford additional strain, it is particularly important to remember that Congress, in CERCLA, did not intend for environmental cleanups to saddle private parties or the public with unbridled costs.

The Eighth Circuit's novel appellate decision to permit prevailing Section 107(a) private party plaintiffs to recover their attorneys' fees without explicit congressional authorization squarely conflicts with the express holdings of the overwhelming majority of federal district courts that have decided this important issue. In awarding attorneys' fees to GE, the Eighth Circuit disregarded the plain language of the statute, the commands of this Court and the obvious congressional intent not to permit such fees to be recovered. Congress did expressly provide for the award of attorneys' fees in two other CERCLA contexts, but it chose not to provide for the award of fees in Section 107(a) private party cost recovery actions. Therefore, the Eighth Circuit's imposition of fee-shifting amounted to impermissible judicial legislation.[14] The Eighth Circuit's ruling will encourage a plethora of lawsuits, increasing the already considerable burden of environmental cases on the federal court system,[15]

NOTES *(Continued)*

cleanup as a "removal action" still permits the private party to avoid the far-more-extensive public participation and cost-effectiveness requirements applicable to remedial actions. *See* notes 5 and 6, *supra.*

14. *See Touche Ross & Co. v. Redington,* 442 U.S. 560, 578-79 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law . . . . [W]e are not at liberty to legislate").

15. Between 1982 and 1989, the number of federal civil actions filed involving "environmental matters" more than doubled, surging from 394 to 938. *See* 1986 Ann. Rep. of the Dir. of the Admin. Off. of the U.S. Cts., at 179;

and will serve as a dangerous precedent for overriding congressional intent to create a right to attorneys' fees in other substantive areas.

Each of the erroneous holdings of the court below will have a substantial and widespread impact. Considered together, their effect is dramatically compounded. Coupling the curtailment of the requirements for public participation and cost-effectiveness with the newly minted right to recoup legal fees expended in an unnecessarily extravagant cleanup encourages financial profligacy during both cleanups and subsequent cost recovery litigation. The Eighth Circuit has handed a blank check to anyone who cleans up a property, even if the cleanup is non-emergent and motivated wholly by greed or by some other ulterior motive of the party performing the cleanup. Such a result contravenes the statutory and regulatory scheme.[16]

Congress intended that CERCLA protect the public interest, not enhance the balance sheet of a sophisticated corporation. As this Court instructed in *Exxon Corp. v. Hunt, supra,* the statute does not "compensate private parties for economic harms that result from discharges of hazardous substances." 475 U.S. at 359. Recovery of *necessary* response costs is permitted only where a private plaintiff complies with CERCLA and the NCP, not where a non-emergent cleanup has been ordered by no regulatory body and has been caused solely by unrelated

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NOTES *(Continued)*

1989 Ann. Rep. of the Dir. of the Admin. Off. of the U.S. Cts., at 181.

16. This case demonstrates the fallacy of assuming that persons who clean up a site would have a financial incentive to select the most economic remedial alternative even if compliance with the NCP were not required. Here, solely in order to avoid fraud claims and keep its windfall profit from the sale of the property, GE contractually obligated itself *before* considering *any* other alternatives to undertake an *unnecessarily* expensive cleanup remedy. Even though the cleanup was caused solely by GE's economic self-interest, GE was rewarded with its cleanup costs and attorneys' fees by the Court of Appeals, which held (erroneously) that "[w]e will not look at the impetus behind a plaintiff's decision to begin the cleanup process" because "the motives of the private party attempting to recoup response costs . . . [under Section 107(a)] are irrelevant". App. A-5.

economic self-interest. The Eighth Circuit's misreading of CERCLA permits GE to profit handsomely from its alleged fraud and distorts the environmental objectives of the statute.

B. The Decision Below that GE's Voluntary Cleanup Was a Removal Action Conflicts in Principle with Controlling Decisions of This Court and the Lower Federal Courts

As discussed above, there is a clear distinction in CERCLA and its regulations between "removal actions" taken in short-term response to an immediate threat to public health or the environment and "remedial actions" providing a long-term or permanent solution to a non-emergent problem. 42 U.S.C. §§9601(23), (24). In *Exxon Corp. v. Hunt, supra,* this Court recognized that "removal" under CERCLA means "short-term cleanup," while "remedial" means "measures to achieve a 'permanent remedy' to a particular hazardous waste problem." 475 U.S. at 360. The EPA reaffirmed this distinction just last year:

> "Although all removals must be protective of human health and the environment within their defined objectives, removals are distinct from remedial actions in that they may mitigate or stabilize the threat rather than comprehensively address all threats at a site. . . . *Removal* authority is mainly used to respond to emergency and *time-critical* situations where *long deliberation prior to response is not feasible*. . . . [A]s stated above, removals are intended to be responses to *near-term threats,* with the ability to respond quickly when necessary. . . ." 55 Fed. Reg. 8695-96 (March 8, 1990) (emphasis added).

Consistent with the plain language of CERCLA and the analysis of this Court and the EPA, the federal courts of appeals and district courts have uniformly classified short-term or interim measures taken to abate an immediate threat to the public as "removal actions" and long-term or permanent cleanups involving non-urgent situations as "remedial actions". *See, e.g., Reardon v. United States,* No. 90-1319 (1st Cir. Dec. 20, 1990) (1990 WESTLAW 209207 at 2); *Alabama v. USEPA,* 871 F.2d

1548, 1551 n.1 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 538 (1990); *United States v. Northeastern Pharmaceutical & Chemical Co.,* 810 F.2d 726, 731 (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987); *State of New York v. Shore Realty Corp.,* 759 F.2d 1032, 1040 (2d Cir. 1985); *Amland Properties Corp. v. Aluminum Co. of America,* 711 F. Supp. 784, 795 (D.N.J. 1989).

In the present case, GE's voluntary and unnecessarily expensive cleanup was caused solely by unrelated economic considerations which dictated the method and extent of cleanup. The only "urgency" involved was the desire of GE, which had known about the residues for at least five years before selling the property, to retain its windfall profit from the sale and avoid a fraud suit by the purchaser. There was never any groundwater contamination or other adverse effect from the 20-year-old residues, nor was there an imminent threat of harm to public health or the environment. Moreover, the gold-plated cleanup method selected by GE before consideration of *any* other alternative, excavation and off-site disposal of a vast quantity of non-hazardous soil, was a permanent remedy and an unnecessarily expensive alternative which took more than one year to complete.

Disregarding these critical indicia, which mandated that GE's cleanup be classified as a "remedial action", the Eighth Circuit branded the cleanup a "removal action" – an aberrant conclusion of law which flies in the face of the express language of CERCLA and the analysis adopted by every other federal court, including this Court in *Exxon.* Instead of seeking to reconcile its result-oriented opinion with the analysis articulated in *Exxon,* the Court of Appeals merely dismissed *Exxon* as not establishing "that an excavation that totally and permanently cleans up a hazardous waste site never can be classified as a removal action." App. A-8.

Had the Eighth Circuit correctly characterized GE's cleanup as a "remedial action", it would necessarily have concluded that GE was not entitled to recover its excessive response costs because it failed to satisfy the public participation and cost-effectiveness requirements which apply to remedial actions. GE selected an unnecessarily costly remedy without

presenting any remedial alternatives to the public for review and comment and without holding any public meetings to discuss proposed remedial alternatives.[17] GE's failure to solicit input from the public and its voluntary selection of a non-cost-effective remedial alternative rendered its action fatally inconsistent with the NCP and barred its recovery of cleanup costs from Litton.[18]

C. The Decision Below that GE Can Recover Its Attorneys' Fees Conflicts in Principle with Controlling Decisions of this Court and with the Holdings of the Overwhelming Majority of Federal District Courts

It is axiomatic that in the United States, a prevailing party is not entitled to recover attorneys' fees from the losing party unless specifically provided by statute. *Alyeska Pipeline Co. v. Wilderness Society, supra,* 421 U.S. at 247. There must be "explicit congressional authorization" – above and beyond mere "generalized commands" – to support an award of attorneys' fees. *Runyon v. McCrary, supra,* 427 U.S. at 185-86.[19] "Unless Congress has expressly authorized a court to shift

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17. The fact that three meetings were held by a state commission in connection with the proposed listing of the property on the Registry did not satisfy the NCP public participation requirements because proposed remedial alternatives were never presented or discussed at those meetings.

18. The 1985 NCP provides an alternative method for satisfying the public participation requirement: compliance with state regulatory provisions which provide "a substantially equivalent opportunity for public involvement in the choice of remedy". 40 C.F.R. §300.71(a)(2)(ii)(D). However, GE cannot successfully contend that it satisfied this alternative method by complying with "legally applicable or relevant and appropriate state requirements" ("ARARS"). Indeed, in the proceedings below, the EPA contended in its *amicus* brief that any suggestion by the District Court that public comment was not required even if GE's cleanup was a "remedial action" because GE complied with ARARS was "troubling", "wrong" and "erroneous" since "it belittles the importance of the public participation contemplated by the NCP."

19. Both *Alyeska Pipeline* and *Runyon v. McCrary* were decided by this Court shortly *before* CERCLA was enacted in 1980. Since Congress knew when it promulgated CERCLA that attorneys' fees could not be recovered unless the statute so expressly provided, the absence of fee-shifting provisions in Section 107(a) private party cost recovery actions must be viewed as deliberate. This is particularly true since Congress, when it enacted Section

the cost of attorney's fees from one party to another, each party is generally expected to pay his own attorney." *Natural Resources Defense Council, Inc. v. Thomas,* 801 F.2d 457, 460 (D.C. Cir. 1986) (citation omitted).

Paying only lip service to these fundamental precepts, the Eighth Circuit held that a prevailing plaintiff in a CERCLA Section 107(a) private party cost recovery action can recover its attorneys' fees from the losing party despite the absence of express statutory language so providing. This novel holding, the first by a federal court of appeals, squarely conflicts with the holdings of the overwhelming majority of federal district courts that have decided this important issue. *See State of New York v. SCA Services, Inc.,* No. 83 Civ. 6402 (S.D.N.Y. Jan. 9, 1991) (1991 U.S. Dist. LEXIS 291); *United States v. Hardage,* No. CIV-86-1401-P (W.D. Okl. Oct. 16, 1990) (1990 WESTLAW 163434 at 54); *Fallowfield Development Corp. v. Strunk,* No. 89-8644 (E.D. Pa. April 23, 1990) (1990 WESTLAW 52745 at 5-6); *Mesiti v. Microdot, Inc.,* 739 F. Supp. 57, 62-63 (D.N.H. 1990); *Regan v. Cherry Corp.,* 706 F. Supp. 145, 149 (D.R.I. 1989); *United States v. Western Processing Co.,* No. C89-214-M (W.D. Wash. Nov. 17, 1989); *T&E Industries, Inc. v. Safety Light Corp.,* 680 F. Supp. 696, 707 (D.N.J. 1988); *Forrest Paint Co. v. Iverson,* No. 87-6040-E (D. Or. June 8, 1987); *Hemingway Transport, Inc. v. Kahn,* 108 B.R. 378, 383 (Bankr. D. Mass. 1989).[20]

The Eighth Circuit's holding is fundamentally flawed in three principal respects. First, the Court erred in straining to expand the language of Section 101(25) of CERCLA to find "a sufficient degree of explicitness" to support an award of attorneys' fees:

NOTES *(Continued)*

107(a) in 1980, *at the same time* enacted Section 104(b) of CERCLA expressly providing for fee-shifting in federal government cost recovery actions.

20. By contrast, the Eighth Circuit cited only two district court decisions which permitted an award of attorneys' fees in Section 107(a) private party cost recovery actions. App. A-13. Both of those decisions relied on the erroneous decision of the District Court *herein.*

> "[Section] 9607(a)(4)(B) allows private parties to recover 'necessary costs of response. . . .' [Section] 9601 (25) defines 'response' as 'remove, removal, remedy, and remedial action; all such terms (including the terms "removal" and "remedial action") *include enforcement activities related thereto.*' (Emphasis added.). A private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute . . . . Attorney fees and expenses necessarily are incurred in this kind of enforcement activity. . . ." App. A-12, A-13.

The Eighth Circuit's heavy reliance on Section 101(25) — which does not even refer to attorneys' fees even though it was modified in 1986 *at the very same time* that Congress expressly chose to provide in Section 310 of CERCLA for the recovery of attorneys' fees in private party citizens' suits (*see* note 9 and accompanying text, *supra*) — was entirely misplaced. The legislative history of that section establishes that Congress was referring to "enforcement activities" by the EPA, not private parties, when it modified the definition of the term "response" in the 1986 amendments to CERCLA. *See* H.R. Rep. No. 253, 99th Cong., 1st sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2848 (the modification of the definition of "response" to include "enforcement activities" is intended to "confirm the *EPA's* authority to recover costs for enforcement actions taken against responsible parties") (emphasis added). This affirmative evidence of congressional intent has driven many federal courts to reject the minority view followed by the Eighth Circuit. *See, e.g., Fallowfield Development Corp. v. Strunk, supra,* No. 89-8644 (E.D. Pa. April 23, 1990) (1990 WESTLAW 52745 at 5-6). *See also Reardon v. United States, supra,* No. 90-1319 (1st Cir. Dec. 20, 1990) (1990 WESTLAW 209207 at 3) ("enforcement" in CERCLA "appears specifically to refer to the measures that may be imposed to force compliance with EPA-ordered removal and remedial actions").

By contrast, nothing in the legislative history of CERCLA suggests that Congress intended the term "enforcement activities" to encompass voluntary private party cost recovery actions

or be used as a springboard for creating a new right to attorneys' fees in Section 107(a) cases. "Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute . . .; it is most improbable that it would have been made without even any mention in the legislative history." *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380 (1988).[21]

Second, just as it disregarded the dispositive legislative history, the Eighth Circuit totally ignored that Congress, in CERCLA, *expressly* provided for fee-shifting in two *other* contexts. *See* notes 7-9 and accompanying text, *supra*. In particular, in Section 310 of CERCLA, Congress expressly permitted private parties bringing citizens' suits to recover attorneys' fees if they prevail. Thus, Congress spoke to the very subject of private parties recovering attorneys' fees by permitting Section 310 private parties to recover them. That it remained silent with respect to Section 107(a) private parties is compelling evidence that it did not intend to create fee-shifting in actions such as the present.[22] As this Court instructed in

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21. Instead of scrutinizing the pertinent legislative history, the Eighth Circuit cited *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691 (9th Cir. 1988) and *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986) to support its conclusion that the term "enforcement activities" encompasses private party cost recovery actions. App. A-12. However, neither of those cases involved the issue of attorneys' fees, and the language upon which the Eighth Circuit relied was mere *dicta*. Ironically, the analysis in *Cadillac Fairview* provides analogous support for Litton's position regarding attorneys' fees. There, the Ninth Circuit held that Section 107(a) of CERCLA does not provide private parties with a right to injunctive relief. Contrasting Section 107(a), which does not mention injunctive relief, with Section 106(a), which expressly grants the President the right to seek injunctive relief, the Ninth Circuit emphasized: "Sections 106(a) and 107(a) indicate that when Congress wished to provide for injunctive relief under CERCLA, it knew how to do so and did so expressly." 840 F.2d at 697. The same is true as to attorneys' fees. *See* notes 7-9 and accompanying text, *supra*.

22. This conclusion is reinforced by the fact that Section 310, which expressly provides for the recovery of fees in citizens' suits, was added to CERCLA by amendment in 1986. Congress therefore had an opportunity (and obviously knew how) to amend CERCLA to provide for fee-shifting but declined to do so in Section 107(a) private party cost recovery actions. *See*

Touche Ross & Co. v. Redington, supra, 442 U.S. at 572:

> "Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly" (citations omitted).

See also National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974) ("[a] frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies").

Finally, the Eighth Circuit's observation that fee-shifting should be judicially created as an incentive for private parties to clean up waste sites, App. A-13, echoes the theory that attorneys' fees should be awarded even absent congressional authorization to litigants who vindicate important public interests. However, that theory was discarded by this Court more than 15 years ago in *Alyeska Pipeline* and *Runyon v. McCrary, supra.* In *Alyeska Pipeline,* this Court emphasized:

> "[C]ongressional utilization of the private-attorney-general concept [in certain statutes] can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award. . . . [C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation . . . and to award fees . . . depending upon the courts' assessment of the importance of the public policies involved in particular cases." 421 U.S. at 263, 269.

NOTES *(Continued)*

notes 7-9 and accompanying text, *supra.* Furthermore, because the types of relief available in Section 310 citizens' suits and Section 107(a) private party cost recovery actions are mutually exclusive, there is no basis for extending the right of private parties to recover attorneys' fees beyond that expressly provided in Section 310. *See Regan v. Cherry Corp., supra,* 706 F. Supp. at 147-50.

In any event, such a theory has no application in the present case since GE was anything but a "private attorney general"; it voluntarily acted solely for its own economic self-interest, not for the benefit of the public. Accordingly, if attorneys' fees are to be awarded in Section 107(a) private party cost recovery actions, they are for Congress, not the Eighth Circuit, to legislate.

CONCLUSION

For each of the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2845

GENERAL ELECTRIC COMPANY,

Appellee,

v.

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC., AND LITTON INDUSTRIES, INC.,

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: October 8, 1990
Filed: December 12, 1990

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BOWMAN, Circuit Judge.

This is an action brought by General Electric ("GE") pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, §107(a), 42 U.S.C. §9607(a) (1988). The District Court[1] ordered Litton to pay GE for certain cleanup costs incurred by GE and also ruled that GE was entitled to recover its attorney fees. Litton appeals. For the reasons set forth below, we affirm.

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1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri. Judge Clark's opinion is published as *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949 (W.D. Mo. 1989).

I.

In 1959, Royal McBee Corporation opened a typewriter plant on a forty-acre plot in Springfield, Missouri.[2] From 1959 to 1962, Royal McBee dumped cyanide-based electroplating wastes, sludge, and other pollutants onto part of the forty-acre tract. Over time, these wastes migrated from the original dumping location, contaminating a larger area of land.

In 1965, Royal McBee merged with Litton Industries, Inc., and Litton became the surviving corporation.[3] The typewriter plant was closed in 1969, and in 1970 GE bought the plant and the surrounding land. In 1980, the Missouri Department of Natural Resources ("MDNR") learned of the hazardous substances that had been dumped at the site and GE was notified. The MDNR and GE concluded in 1981 that there was no potential for groundwater contamination, and performed no cleanup work at the site.

In 1984, GE agreed to sell the vacant nineteen acres at the site (where the dumping had occurred) to Enterprise Park, a real estate concern that intended to develop the property for commercial purposes. In July 1985 the MDNR changed course and decided to propose that the site be placed on Missouri's Registry of Abandoned and Uncontrolled Hazardous Waste Sites of Missouri. GE appealed this proposed registry, while Enterprise Park notified both GE and Litton of potential CERCLA claims. On three separate occasions from September 1985 to March 1986, the Missouri Hazardous Waste Commission held public meetings to discuss, among other things, the proposed registry of the GE site. In October 1985, the Missouri Department of Health ("MDOH") stated that the contaminants in the soil at the

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2. This land will be referred to in this opinion as "the site."

3. Royal McBee's assets were acquired by a wholly-owned subsidiary of Litton which later was merged into a surviving corporation called Litton Industrial Automation Systems, Inc. For purposes of this opinion, "Litton" refers to both Litton Industries, Inc. and Litton Industrial Automation Systems, Inc. The judgment of the District Court as amended November 1, 1989, runs against both of these corporations.

site posed "a significant health threat and . . . should be removed." Appellants' Appendix, vol. VIII, §58, at 1861.

During that same month, GE hired OH Materials Company to investigate the site and conduct any response actions deemed necessary. In December 1985, the Environmental Protection Agency ("EPA") decided that Missouri should take enforcement action for the site and stated that the 1981 MDNR findings, in light of improved scientific knowledge, were erroneous. On December 16, 1985, GE and Enterprise Park entered into a Settlement Agreement. The Agreement essentially held GE liable for any cleanup costs incurred at the site and called for GE to attempt to keep the site off the Registry.

In late 1985 and early 1986 GE, the MDNR, and Enterprise Park negotiated a Consent Decree. The Decree called for the development and implementation of a cleanup plan for the site. It required any cleanup action to be consistent with the National Contingency Plan ("NCP"), EPA Superfund Programs, 400 CFR §300 *et. seq.* (1986), and required MDNR approval of all action.

Pursuant to their site investigation, OH Materials produced an analysis of several possible cleanup actions. Although the most expensive alternative, excavation was chosen as the best and most effective response action. Excavation began on October 13, 1986. On that day, three large drums were discovered buried at the site. Shortly thereafter, a trench was discovered, along with a fourth drum. This drum contained extremely hazardous substances. Excavation continued until December 7, 1986, when work was halted pending further site analysis. More excavation was performed in May 1987 and the cleanup was completed in December 1987.

Most of the soil was disposed of as a nonhazardous waste, minimizing cleanup costs. The drums and the more-contaminated soil were disposed of as hazardous wastes. In early 1988 the MDNR approved the cleanup of the site, withdrew the proposed registry, and stated that the site had been properly cleaned.

Even though Litton had been notified by both GE and Enterprise Park in 1985 about its potential CERCLA liability,

Litton never participated in any of the investigation, evaluation, or cleanup of the site. In March 1987, while the cleanup was still in progress, GE made a formal demand on Litton asking it to indemnify GE for the cleanup costs. In June 1987 GE filed suit, seeking to recover its response costs for cleaning up the site. In August 1988 GE filed an amended complaint, seeking to recover its cleanup costs pursuant to §107(a) of CERCLA, 42 U.S.C. §9607(a).

Following a four-day bench trial in May 1989, the District Court found that there had been a release of hazardous substances, that Litton was responsible for the release, that GE's response was necessary, and that GE's cleanup actions met the provisions of CERCLA and the NCP. The District Court ordered Litton to pay GE more than $940,000 as reimbursement for the response costs incurred. The District Court also ruled that attorney fees were recoverable, and ordered Litton to pay GE more than $419,000 in attorney fees and expenses.

On appeal, Litton claims that 1) GE should not be allowed to recover its cleanup costs because the cleanup was induced by the threat of a lawsuit; 2) GE's response was not consistent with the NCP; 3) the District Court erred in not apportioning some of the response costs to GE; and 4) the District Court erred in allowing GE to recover its attorney fees.

II.

42 U.S.C. §9607(a) holds the party responsible for a hazardous substance release liable for cleanup costs incurred as a result of the release. It allows a private party who incurs such costs to recoup its cleanup expenses from the responsible party. 42 U. S. C. §9607 (a) (4) (B). In order for a private party to recover these costs from the responsible party, the release of hazardous substances must have "caused" the incurrence of the costs. Litton claims that a release of pollutants did not "cause" GE's response, but rather, the threat of a lawsuit "caused" GE's response.

Although couched in terms of causation, this argument is really an "unclean hands" defense to GE's CERCLA claim.

Litton asserts that GE failed to tell Enterprise Park of the known contaminants at the site when it sold the property to Enterprise Park in 1984, even though GE knew of the problem by 1980 at the latest. Litton claims that only after Enterprise Park found out about the contaminants, and threatened GE with a lawsuit, did GE begin its response. Therefore, according to Litton, the response was "caused" by GE's reaction to the possible lawsuit, not by the release of pollutants.

This argument is without merit. CERCLA is a strict liability statute, with only a limited number of statutorily-defined defenses available. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377-78 (8th Cir. 1989) ; *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2nd. Cir. 1985). The available defenses are that the release was caused solely by an "act of God [or] war," or that the release was caused solely by a third party whose actions were not foreseeable by the defendant, who was exercising due care with respect to the hazardous substance. 42 U.S.C. §9607(b). The third party must not be an employee or agent of the defendant, nor have entered into a contractual relationship with the defendant. 42 U.S.C. §9607(b). CERCLA does not provide for an "unclean hands" defense; the liability imposed by 42 U.S.C. §9607(a) is subject only to the defenses noted above. Thus, the motives of the private party attempting to recoup response costs under 42 U.S. C. §9607 (a) (4) (B) are irrelevant. The purpose of allowing a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites. This purpose would be frustrated if a plaintiff's motives were subject to question. We will not look at the impetus behind a plaintiff's decision to begin the cleanup process; we will look only to see if there has been a release or threatened release for which the defendant is responsible. 42 U.S.C. §9607(a). Undoubtedly such a release occurred at the site. As found by the District Court, "(f)rom 1958 to 1963, [the] defendant dumped 500 gallons per year of waste chemicals on the ground in question. Additionally, . . . a trench was used to bury a barrel which contained . . . toxic material." *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 957 (W.D.

Mo. 1989). GE's response was "caused" by Litton's release, and therefore meets this criterion of CERCLA.

III.

Litton next argues that the mandate of 42 U.S.C. §9607(a)(4)(B), that the response be "consistent with the national contingency plan," was not met by GE. This section allows a private party to recover its response costs from the responsible party only if the response was necessary and consistent with the NCP. 40 CFR §300.71, entitled "Other Party Responses," details the response actions that are considered to be consistent with the NCP. If the response is characterized as a removal action, then it must be taken in circumstances warranting removal and be consistent with 40 CFR §300.65. If the response is deemed to be a remedial action, then it must be consistent with 40 CFR §300.68, as well as be cost-effective and provide for public comment, or a substantially equivalent opportunity for public involvement. 40 CFR §300.71 (a) (2). In addition, private party responses must comply with all applicable Federal, state, and local requirements. 40 CFR §300.71(a)(4).

A.

The decision whether to characterize a response action as a "removal" action or a "response" action is determined by 42 U.S.C. §§9601(23) and (24). A removal action is defined as

> the cleanup or removal of . . . hazardous substances from the environment, . . . the disposal of removed material, or the taking of such other actions as . . . necessary to . . . mitigate damage to the public health . . . . The term includes . . . without being limited to . . . fencing, . . . provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals. . . .
>
> 42 U.S.C. §9601(23). A remedial action is defined as one consistent with permanent remedy taken instead of or in addition to removal actions. . . . The term includes, but is not limited to, such actions . . . as storage, confinement,

> . . . neutralization, cleanup of . . . contaminated materials, recycling, . . . diversion, destruction, . . . dredging or excavations, . . . [and] onsite treatment. . . . [T]he term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances. . . .

42 U.S.C. §9601(24).

We agree with the District Court's determination that GE's action can be characterized as a removal action. *General Elec. v. Litton,* 715 F. Supp. at 960. GE's excavation of soil and buried drums is undoubtedly a "removal of hazardous substances from the environment." 42 U.S.C. §9601(23). Although CERCLA's definition of remedial action lists excavations as a remedial example, and its definition of removal action does not explicitly mention excavations, an excavation is not beyond the pale of a removal action. *See* 40 CFR §300.65(c), which lists "(r)emoval of highly contaminated soils" and "(r)emoval of drums" as removal actions. Any distinction between "excavation" of contaminated soils and "removal" of contaminated soils is one that eludes us. We therefore conclude that it is proper to evaluate GE's response using the NCP guidelines for a removal action.[4]

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4. Litton argues that the removal action issue was never introduced by GE, nor decided upon by the District Court. On the second point, Litton is clearly wrong, as evidenced by the following passage: "The Court finds that GE's action was consistent with the NCP as a removal action." *General Elec. v. Litton,* 715 F. Supp. at 960. Regarding Litton's claim that GE never argued that its response was a removal action, GE's First Amended Complaint repeatedly refers to GE's "response action," which encompasses both removal actions and remedial actions. Appellants' Appendix, vol. I, §2, at 30. Litton also argues that only short-term, temporary responses can be considered removals and that GE's response was neither. *See Exxon Corp. v. Hunt,* 475 U.S. 355, 360 (1986); *United States v. Northeastern Pharmaceutical & Chem. Co.,* 810 F.2d 726, 731 (8th Cir. 1986) ("*NEPACCO*"). The NCP, however, specifically contemplates excavations as appropriate removal actions, 40 CFR

B.

As stated earlier, in order for removal action costs to be recoverable under 42 U.S.C. §9607(a) (4) (B) the action must be consistent with 40 CFR §300.65. That section of the NCP states that for a removal action, the following be done: 1) a site assessment be performed; 2) an effort be made to involve the responsible party, if known; 3) an evaluation be made of possible responses, based on the following factors: a) exposure to people; b) contamination of water; c) barrels that pose a threat of release; d) contaminated soil that may migrate; e) weather conditions that may affect the contaminants; f) threat of fire; and g) other factors; 4) the cleanup action begin as soon as possible in an appropriate manner; and 5) contaminated soil and barrels of contaminants be removed, where removal will reduce the spread of contamination and the likelihood of exposure to humans. 40 CFR §300.65.[5]

We agree with the District Court's determination that GE "implemented the removal action consistent with §300.65." *General Elec. v. Litton,* 715 F. Supp. at 961. First, the site was evaluated in 1981 by the MDNR and GE, and again in 1985 by the MDOH, OH Materials, the MDNR, and GE. *General Elec. v. Litton,* 715 F. Supp. at 951-952. Second, both GE and Enterprise Park notified Litton of the potential cleanup to take place at the site.[6] GE is not required to force Litton to

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NOTES *(Continued)*

§§300.65(c) (6) and (7). We hold that GE's response was not too time-consuming to be considered a removal, as the cleanup took a little more than a year, with work performed in three segments over a span of five different months. We do not read either *Hunt* or *NEPACCO* as establishing that an excavation that totally and permanently cleans up a hazardous waste site never can be classified as a removal action.

5. 40 CFR §300.65(b) (3) requires removal actions to end after either one million dollars has been obligated or six months have elapsed from the date of the initial response. However, 40 CFR §300.65(i) exempts private party responses such as GE's from these limitations.

6. We note that after Litton/Royal McBee stopped dumping the chemical wastes at the site in 1962, it dumped the same wastes at the Fulbright Landfill in Springfield from 1962 to 1968. *See General Elec. v. Litton,* 715 F. Supp. at 951. As a result of this dumping activity, Litton entered into an Administrative

participate in the evaluation and cleanup process; it is required only to attempt to involve the responsible party in the process. This requirement was satisfied.

Third, an evaluation of potential response actions was prepared by OH Materials for GE. The District Court found that "OH Materials produced a Remedial Alternatives Evaluation for the site ("RATE report"] . . . which analyzed several alternative response actions." *General Elec. v. Litton,* 715 F. Supp. at 953. The District Court also found that the evaluations performed by OH Materials and the MDOH "considered points of exposure, population, environmental and welfare concerns at risk, amount, concentration, hazardous properties, hydrogeological factors, and the extent to which the contamination levels exceeded the State standards." *General. Elec. v. Litton,* 715 F. Supp. at 953. The evaluation resulted in a determination that excavation was appropriate.

We are satisfied that the thorough evaluation that was performed here is consistent with the NCP; specifically, with 40 CFR §300.65(b)(2). The site evaluation does not have to comply strictly with the letter of the NCP, but only must be consistent with its requirements. *NL Indus. Inc., v. Kaplan,* 792 F.2d 896, 898-99 (9th Cir. 1986). It is not necessary that every factor mentioned by the NCP be dealt with explicitly; thus, for instance, a failure to consider explicitly the weather conditions factor is not fatal to an evaluation's consistency with the NCP. As a matter of law, the evaluation performed for GE by OH

Order and Consent Decree with the EPA and the MDNR in March 1986. Appellants' Appendix, vol. IX, §107. The Decree dealt with the same chemical wastes dumped at the typewriter plant site, and included an acknowledgement by Litton that the wastes were hazardous substances. *General Elec. v. Litton,* 715 F. Supp. at 958. The Decree also obligated Litton to reimburse the EPA for its cleanup costs incurred pursuant to CERCLA and the NCP. Appellants' Appendix, vol. IX, §107, at 2631. Thus, when Litton was informed of the potential CERCLA claims at the typewriter plant site by GE and Enterprise Park, it knew or should have known of the process that was likely to follow. Based on this prior or simultaneous knowledge, Litton cannot claim to have been shut out of the evaluation and cleanup process unfairly. Thus, GE's notification actions, coupled with Litton's prior knowledge, satisfied the NCP requirement that an effort be made to involve the responsible party.

Materials was consistent with the NCP requirements concerning a removal action.

GE's response time also was consistent with the NCP's removal action guidelines. The MDNR proposed registry of the site on the hazardous waste sites listing in July 1985. In December 1985 the EPA found that the wastes at the site constituted a threat to the environment. By this time GE had hired OH Materials to assess the site and develop possible alternative responses. The RATE report was completed in February 1986. After further consultation with the state, the excavation began in October 1986. We hold that such a response time is consistent with the NCP's requirement to begin the cleanup in an appropriate manner as soon as possible.

Finally, excavation of the site is consistent with the NCP, as 40 CFR §§300.65(c)(6) and (7) explicitly list removal of contaminated soils and drums containing hazardous substances as appropriate removal actions.

We hold that GE's response can be characterized properly as a removal action, was warranted by the hazardous conditions at the site, and was consistent with the NCP guidelines governing removal actions. Therefore, the costs associated with GE's response action are recoverable under 42 U.S.C. §9607(a)(4)(B).[7]

IV.

Litton argues that even if it can be held liable under 42 U.S. C. §9607 (a) (4) (B) , it should not be held responsible for all of the costs incurred by GE. Instead, Litton asserts that liability for the cleanup costs should be apportioned between Litton and GE, with GE responsible for all "non-necessary" costs.[8] Litton argues that some of the cleanup costs were not

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7. Having found that GE's response was a removal action, we do not need to reach the issue of whether the response met the NCP remedial action guidelines. Similarly, as Litton's claim that it was denied due process is predicated on the assertion that GE's action was a remedial action, this claim also becomes moot.

8. Litton's related apportionment argument based on 42 U.S.C. §9613(f)(1) cannot succeed, because that section, allowing for apportionment of costs between liable parties, does not apply to GE. GE would be a section 9613

"necessary" under CERCLA, but were incurred instead by GE solely to upgrade the site and realize a profit on its sale to Enterprise Park. It is this portion of the cleanup costs that Litton asserts should be apportioned to GE, because 42 U.S.C. §9607(a) (4) (B) allows a private party to recover only its "necessary" costs of response.

As noted earlier 40 CFR §300.71, governing private party responses, requires such responses to comply with "all otherwise legally applicable or relevant and appropriate Federal, State, and local requirements, including permit requirements." 40 CFR §300.71(a) (4). During the course of the site evaluation and cleanup, the MDNR established a set of cleanup levels for the site. In order for the site to be considered cleaned properly, the levels of various elements (such as lead, arsenic, and nickel) in the soil could not exceed these state-imposed standards. These standards were not met until after the final cleanup performed in November 1987. Even then, one "grid" at the site did not meet the MDNR levels, even though that area had been excavated down to the bedrock and further excavation was not possible.

It was not until after the final cleanup work was performed in November 1987 that the site met the state-imposed standards and the state approved the cleanup. All of the cleanup work performed was necessary to meet the state standards. Since 40 CFR §300.71(a) (4) incorporates applicable state requirements into the requirements of an NCP-consistent response action, the cleanup performed by GE was "necessary" under 42 U.S.C. §9607(a)(4)(B). To be consistent with the NCP, GE's response action had to comply with the state standards, which it did. There is no evidence of any response action taken over and above that required to satisfy the state standards. GE simply met the standards imposed by the state.[9] Thus, GE is not

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(f) (1) liable party only if it owned the site at the time the wastes were dumped or was responsible otherwise for the dumped wastes. See 42 U.S.C. §9607(a). Since that is not the case, GE is not a liable party and cannot be held liable under 42 U.S.C. §9613(f)(1).

9. Litton argues that GE went "above and beyond the call of duty" when cleaning the site to satisfy its Settlement Agreement obligations to Enterprise

subject to an apportionment of "non-necessary" costs, because there were no "non-necessary" costs.

V.

Finally, Litton argues that the District Court erred in awarding GE attorney fees and expenses. Litton asserts that CERCLA does not allow explicitly for private parties to recover litigation expenses and therefore, under the American rule, each side must pay its own litigation costs.

The general rule is that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Co. v. Wilderness Soc'y,* 421 U.S. 240, 247 (1975). "(A)bsent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Runyon v. McCrary,* 427 U.S. 160, 185 (1976). Thus, in order to uphold an award of attorney fees, we look to the language of CERCLA. We must find more than "generalized commands," *Runyon v. McCrary,* 427 U.S. at 186; there must be a clear expression of Congress' intent.

As noted earlier, 42 U.S.C. §9607(a)(4)(B) allows private parties to recover "necessary costs of response . . . consistent with the national contingency plan." 42 U.S.C. §9601(25) defines "response" as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') *include enforcement activities related thereto.*" (Emphasis added.). A private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute. *See Cadillac Fairview/California, Inc. v. Dow Chem. Co.,* 840 F.2d 691, 694 (9th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.,* 792 F.2d 887; 892 (9th Cir. 1986). Attorney fees

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NOTES *(Continued)*

Park. That agreement, however, only obligated GE to clean the site so that it would not be placed on the state hazardous site registry. Appellants' Appendix, vol. VII, §35, at 1581. To keep the site off of the registry, GE had to meet the state cleanup standards, which is what 40 CFR §300.71(a)(4) required. Thus, the agreement did not obligate GE to clean the site past what CERCLA and the NCP required.

and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with two of the main purposes of CERCLA – prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.

Litton also questions whether the attorney fees awarded here are reasonable in amount. We give great deference to the District Court's judgment in the award of attorney fees, because "the district court is best equipped to determine whether hours were reasonably expended [and] whether the attorneys' hourly rates are within the general rates charged . . . in the relevant community . . ." *Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986). Finding no abuse of discretion, we affirm the award.

Based on our reading of the statute, we find no error in the ruling of the District Court that CERCLA allows a private party to recover its attorney fees and expenses incurred in bringing a cost-recovery action pursuant to 42 U.S.C. §9607(a)(4)(B).[10] We

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10. We are not aware of any other circuit court ruling on this issue. We note that various district courts have split on this question. Besides the District Court in this case, this issue was decided in *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 949-52 (C.D. Cal. 1990) (holding that attorney fees are recoverable in a private party CERCLA action); *Shapiro v. Alexanderson*, 741 F. Supp. 472, 480 (S.D. N.Y. 1990) (recoverable) ; *United States v. Hardage*, 1990 WL 163434, *54 (W.D. Okl. 1990) (not recoverable); *Fallowfield Dev. Corp. v. Strunk*, 1990 WL 52745, *5-*6 (E. D. Pa. 1990) (not recoverable) ; *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 62-63 (D. N.H. 1990) (not recoverable); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D. R.I.

are satisfied that the District Court's award was legally correct and reasonable in amount and that it should not be disturbed.

VI.

We affirm the judgment of the District Court awarding GE the reasonable and necessary costs of its cleanup, including the attorney fees and expenses incurred in bringing this cost-recovery action.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit

NOTES *(Continued)*

1989) (not recoverable); *T & E Ind. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D. N.J. 1988) (not recoverable); *BCW Assoc. v. Occidental Chem. Corp.*, 1988 WL 102641, *23 (E.D. Pa. 1988) (not recoverable); and *Hemingway Transp., Inc. v. Khan*, 108 B. R. 378, 383 (Bkrtcy. D. Mass. 1989) (not recoverable).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2845WM

GENERAL ELECTRIC COMPANY,

Appellee,

vs.

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.
AND LITTON INDUSTRIES, INC.,

Appellants

Appeal from the United States District Court for the Western District of Missouri

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After consideration of the court, appellee's application for attorney fees, expenses, and interest in the amount to which the parties have stipulated, namely, $100,000 is granted.

Appellants' motion to stay the mandate pending application to the Supreme Court for a writ of certiorari is also granted.

January 9, 1991

ORDER ENTERED AT THE DIRECTION OF THE COURT

Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

GENERAL ELECTRIC COMPANY,
Plaintiff,

v.

LITTON BUSINESS SYSTEMS, INC.,
Defendant

No. 87-3333-CV-8-4.

United States District Court,
W.D. Missouri, S.D.

June 20, 1989.

ORDER

RUSSELL G. CLARK, District Judge.

Plaintiff brought this action against defendant for recovery of costs pursuant to 42 U.S.C. §9607(a) of the Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA). This case was tried to the Court without a jury from May 15, 1989 through May 18, 1989. Pursuant to Rule 52, Fed.R.Civ.P., the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Litton Industrial Automation Systems, Inc., Litton Business Systems, Inc., and Litton Industries, Inc., are successors by merger to Royal McBee Corporation, a New York corporation, and its subsidiary Royal Typewriter (hereinafter jointly referred to as "Royal McBee").

2. Royal McBee operated a typewriter manufacturing facility at 2401 East Sunshine Street, Springfield, Missouri, between 1959 and 1965.

3. In 1965, pursuant to an agreement of merger, Royal McBee merged with Litton Industries, Inc. ("Litton"), a Delaware corporation, and Litton became the surviving corporation.

4. At about the same time, the assets and liabilities of Royal McBee were acquired by the Royal Typewriter Company, Inc.,

a division and wholly owned subsidiary of Litton which continued to operate the typewriter manufacturing business at the same location until approximately July 1967.

5. In approximately July 1967, Litton merged its wholly-owned subsidiary, Royal Typewriter Company, Inc., into some other Litton wholly-owned subsidiaries, the survivor of which became known as Litton Business Systems, Inc. ("LBSI"), a New York corporation.

6. LBSI closed the Royal business at 2401 East Sunshine Street in 1969. GE purchased the Royal McBee building at 2401 East Sunshine in March, 1970.

7. During the period from 1958 through March, 1970, Royal McBee, Royal Typewriter Company, Inc. and LBSI also owned a tract of vacant land immediately north of Sunshine and adjoining the Royal McBee typewriter facility to the immediate west. In March, 1970, LBSI conveyed this tract (Sunshine property) to GE as part of the transaction involving the manufacturing plant.

8. Effective August 1, 1988, Litton merged LBSI into Litton Industrial Automation Systems, Inc. ("LIASI"), a Delaware corporation, and LIASI assumed all of the obligations and liabilities of LBSI.

9. Litton and LIASI currently are both duly authorized and existing corporations under the laws of the State of Delaware.

10. In 1958 Royal McBee purchased land near the intersection of Sunshine and Glenstone Streets in Springfield, Missouri for a plant. Royal McBee used its plant to manufacture Royal typewriters.

11. As a byproduct of its manufacturing process, Royal McBee generated cyanide-based electroplating wastes, sludge from the bottom of electroplating tanks and spent plating bath solution.

12. As a part of their duties, Royal McBee employees poured, emptied and dumped the electroplating sludge, tank bottoms and spent plating solution onto the soil surface of the vacant western portion of the Sunshine property during the period 1959-1962 in an area near a "turn-around" at the end of an old construction road on the property.

13. Over time, the metals and cyanide from the wastes dumped by Royal McBee leached and migrated outward and downward from the original dumping location, thus accounting for the larger area ultimately cleaned up.

14. Currently, the vacant western portion of the property containing the site is adjacent to an apartment complex on the west, a housing development on the north, and GE's (formerly Royal McBee's) building on the east. The vacant western portion of the property containing the site fronts on Sunshine Street, a major east/west thoroughfare in Springfield and was one of the last pieces of vacant property on Sunshine between Glenstone Avenue and Highway 65. There is commerce, including retail, manufacturing, restaurant, and housing all around the property. Since the site has been cleaned up, the property has been subdivided and is currently scheduled to be commercial, retail and light industrial property. The gradient of the contaminated area of the site is southwest toward the treeline and apartment complex.

15. The same wastes which were disposed of on the site from 1959-1962 were disposed of by Royal McBee and Litton at the Fulbright landfill in Springfield, Missouri beginning in 1962 when the Fulbright landfill opened (Plaintiff's Exhibit No. 99).

16. There is no evidence that GE dumped any electroplating wastes, or wastes containing the chemicals listed above on the site or the property.

17. In the summer of 1980, when the Missouri Department of Natural Resources ("MDNR") was investigating the defendant's Fulbright dumping activities, GE first learned of Royal McBee's dumping of hazardous wastes on the site. MDNR investigators sought and received GE's permission to interview former Royal McBee workers whom GE then employed. During these interviews at GE's plant, the employees described how they dumped Royal McBee's cyanide-based electroplating solutions and residues on the ground at the Fulbright landfill and on the Sunshine property.

18. In 1981, based on testing done by the MDNR and GE, and the then present technology and health assessments, it was GE's and MDNR's opinion that there was no potential for

contamination of the groundwater at the site. In 1984 GE agreed to sell the vacant tract of the property including the site (approximately 19 acres) to an investment group which subsequently assigned the property to Enterprise Park.

19. On July 19, 1985, the MDNR proposed registry of the GE site on Missouri's Registry of Abandoned and Uncontrolled Hazardous Waste Sites in Missouri. On August 16, 1985, GE appealed the proposed registry of the site on Missouri's Registry of Abandoned and Uncontrolled Hazardous Waste Sites. Litton was notified of potential CERCLA claims in August, 1985, but did not participate in any of the negotiations.

20. Pursuant to statute, the Missouri Hazardous Waste Commission reviews the status of all sites proposed for the registry which have been appealed. The GE site was discussed at the Hazardous Waste Management Commission meeting on at least three occasions both before and during the course of the clean-up at the site. These Hazardous Waste Management Commission meetings were public meetings of which there was prior published public notice and at which members of the public attended. See plaintiff's Exhibit No. 248.

21. On October 15, 1985, John Crellin, Director of the Bureau of Epidemiology of the Missouri Department of Health ("DOH"), stated that the concentrations of metal in the soil at the Site "represent[ed] a significant health threat and contaminated soil should be removed." Dr. Crellin's health assessment also stated that "current concentrations of chromium, copper, zinc, nickel and arsenic at the General Electric site represent a significant health risk to the public's health. . . . Cleanup at this site should be concerned with removal of soil to reduce concentrations of these contaminants to below the recommended safe soil level." (Plaintiff's Exhibit No. 1).

22. In October 1985, GE hired OH Materials Company of Findlay, Ohio, an experienced environmental services company, to investigate, assess, monitor and conduct any response actions which were determined to be necessary.

23. On December 20, 1985 the Environmental Protection Agency ("EPA"), found that enforcement action was needed by Missouri for the GE site and that "review of old data revealed

that what was considered to be trace amounts in 1981 are now acknowledged as representing a threat to human health and the environment." (Plaintiff's Exhibit No. 220).

24. Throughout the latter part of 1985 and 1986, GE and MDNR engaged in extensive studies of the site and negotiations over its remediation. These discussions culminated in a Consent Decree entered into before the Missouri Hazardous Waste Management Commission which set forth the circumstances and requirements for ongoing remediation of the site. The Decree was executed by GE, by Enterprise Park, by the Missouri Attorney General's office, and by Frederick A. Brunner, Ph.D., the Director of MDNR. In general, the Decree was implemented "to protect the public health and environment from releases or threatened releases of waste materials, if any, from the site through the development, design and implementation of a remedial action plan." (Plaintiff's Exhibit No. 158).

25. The Consent Decree required all remedial action for the site to be "consistent with the National Contingency Plan ["NCP"]." The Consent Decree required MDNR approval of all remedial action.

26. Testing of the soil at the Sunshine property showed that the concentration of metals from three feet deep to the soil surface were considerably above the background levels (i.e. normal soil levels) for the site and many times higher than the safe soil levels determined by the Department of Health. Test results from all of the testing which was performed at the site confirmed that the metals found on the site – copper, chrome, nickel, zinc, lead, and cyanide – were not there from natural causes but were elevated, concentrated and associated with one another, thus indicating that the property was a disposal site, and that the levels of these heavy metals were greater than background levels.

27. GE had OH Materials investigate a range of alternatives for response actions at the site, to insure the response actions ultimately taken would be consistent with the NCP and Consent Decree.

28. OH Materials produced a Remedial Alternatives Evaluation for the site (hereinafter referred to as the "RATE report")

which analyzed several alternative response actions. (Plaintiff's Exhibit No. 5). The costs and benefits of those various alternatives were estimated and outlined in the RATE report of February, 1986. The most expensive remedy was excavation and removal of the soil and disposal of it as a hazardous waste in a hazardous waste landfill. Clay capping was seen to be the next most expensive remedy, followed by excavation and removal as a nonhazardous waste. Fencing and guarding was initially seen as the least expensive remedy; however, guarding at a cost of one hundred thousand dollars a year was seen as necessary given the substantial risk outlined by the DOH and the likelihood that any fence would be breached by children or others from the surrounding apartments or residential areas. Guard service in perpetuity drove the cost of that alternative up over all other proposed remedies.

29. Evaluation of the site by OH Materials and the DOH considered points of exposure, population, environmental and welfare concerns at risk, amount, concentration, hazardous properties, hydrogeological factors, and the extent to which the contamination levels exceeded the State standards.

30. The OHM personnel who performed the remediation of this site, Messrs. Ossi, Haag, Edinger and Stevens, have participated in scores of environmental projects under CERCLA and the NCP, and have expertise in geology, hydrogeology, engineering, and site remediation activities. Their Company has numerous emergency response contracts with various state governments as well as the USEPA. They and their company were well qualified for the remediation work they undertook on behalf of the plaintiff. Each of them testified forthrightly and credibly. Mr. Ossi testified as to the analytical results found at the site, levels which the Court recognizes were well in excess of those permitted by the Department of Health. Mr. Haag testified as to his "ECA analysis," which found by virtue of elevation, concentration and association of various chemicals that hazardous waste had been placed at the site. The area of contamination identified by Mr. Haag's ECA analysis coincided with the dumping areas described by Messrs. Carroll and McKinnis when Mr. Haag's transparencies were placed on the

aerial photographs in evidence. Remediation was necessary within the area defined by Mr. Haag; unnecessary areas were not excavated; and the area of contamination was properly identified.

31. Defendants presented no evidence of any less costly alternatives for remediation of the site which would have met the State clean-up levels.

32. Pursuant to the Missouri Superfund statute and regulations, the MDNR stated that GE could clean up the site to the less stringent of DOH standards or the background levels of metals in the soil.

33. The original remedial levels were established by the MDNR and incorporated into the Work Plan prepared by OH Materials. These levels were: nickel—10 ppm; chromium and lead—50 ppm; copper—20 ppm; cyanide—840 ppm; and zinc—1,000 ppm. Arsenic was established as the higher of 4 ppb or background levels to be later determined and approved by the MDNR.

34. The site was marked into fifty foot grids offsetting by twenty-five feet the old sample locations so that the old sample locations were in the center of each new grid. The soil was excavated from grid to grid and samples were taken after grids were excavated to determine if further excavation was necessary. Excavation began October 13, 1986 and continued until December 7, 1986, when it was terminated pending receipt of analytical results.

35. On the first day of excavation, three 55-gallon drums were discovered buried under the soil surface. On November 19, 1986 an apparent trench was discovered which contained a fourth drum. The fourth drum contained substances which were tested and found to be EP-toxic (characteristically hazardous).

36. The EP-toxic soil and the drums were removed from the site during remediation and were transported to Chemical Waste Management at Emelle, Alabama on or about November 3, 1987 and disposed of in a hazardous waste landfill.

37. As a result of the discovery of the first three drums, the MDNR required the Work Plan to be modified to provide

for a metal scan of the remedial area, which was performed December 3, 1986.

38. Based on analytical results obtained from the work done at the site, on February 17, 1987, GE requested from MDNR and DOH a revision of the remedial levels to 150 ppm for lead, 150 ppm for chrome, 20 ppm for arsenic and 20 ppm for nickel, based on revised estimated background levels. The MDNR and DOH subsequently revised and approved clean-up levels of 230 ppm for lead, 230 ppm for chrome and 230 ppm for arsenic based on a revised health assessment by the Department of Health. The MDNR also later revised and approved the remedial level for nickel to 15 ppm.

39. On November 17, 1987 analytical results indicated that all remedial levels were reached in all grids except one which was at bedrock. With the exception of the one grid which was at bedrock, all grids were below the remedial levels required by the Consent Decree with the MDNR and Work Plan.

40. As the most cost effective method that achieved the remedial objectives, GE had recommended disposing of the excavated soil as a nonhazardous waste, or Missouri "special waste," in a sanitary landfill rather than a hazardous waste landfill permitted under the Resource Conservation and Recovery Act ("RCRA"). The MDNR agreed and allowed the waste to be disposed of as a special waste, thus saving a great deal of expense in transportation and disposal charges.

41. The MDNR approved all the response activities of GE both before and after completion of the response actions. MDNR personnel who reviewed, approved and/or were personally present on site during remediation include Suzanne Marcell—On Scene Coordinator, Greg Schoen—Field Technician, Burt McCollough—Super Fund Unit Chief, Keith Schardein—Super Fund Section Chief and Frederick A. Brunner, Ph.D.—Director of the MDNR. On February 8, 1988, after final testing, MDNR Director Frederick A. Brunner, Ph.D. issued an approval of GE's Certificate of Completion of all Site Remediation.

42. Theodore F. Craver, an in-house environmental attorney and vice president for Litton, testified that on behalf of

Litton he received written notice of potential CERCLA claims concerning the site on or about August 28, 1985, prior to the incurrence of any response costs by GE. (See also plaintiff's Exhibit No. 134). Mr. Craver also admitted that very shortly thereafter he received a telephone call from GE's in-house counsel concerning potential Litton and GE cooperation in clean-up of the site, also before GE began its investigation or incurred any response costs. Mr. Craver received a subsequent telephone call from GE's in-house counsel in November of 1986, approximately one month after the GE's site remediation had been commenced. Litton, and specifically Mr. Craver, has experience in the environmental area dealing with hazardous waste sites and was subsequently involved in the investigation of the Fulbright landfill in Springfield during the entire period of time GE investigated and cleaned up the Sunshine site.

43. GE spent $84,182.39 on the investigation, sampling, analysis and development of the remedial investigation/feasibility ("RI/FS") study which were called in this case the Site Data Report (RI) and the Remedial Alternatives Analysis (FS). This cost also included the development of the Work Plan. These costs represent out of pocket costs to third parties and include no allocation of GE personnel costs and expenses (Plaintiff's Exhibit No. 21).

44. The actual cost of the response actions exceeded the original estimate due to several factors, but mostly due to the unexpected presence of buried drums and the fact the nearby landfill which had agreed to take the soil backed out at the last minute due to local publicity. The closest permitted landfill which would then accept contaminated soil was in St. Louis.

45. The actual cost of the clean-up, excavation, transportation, disposal of the hazardous soil and the analytical and report preparation for the actual removal was $851,560.84. Additionally, GE incurred $5,100 in telephone and utility fees. These costs represent out of pocket costs to third parties and include no allocation of GE personnel costs and expenses.

46. The response costs charged by OH Materials and paid by GE were the ordinary and reasonable fees charged by OH Materials for the work performed. The total reasonable and

necessary response costs on the site which were consistent with the NCP was $940,843.23.

47. General Electric has incurred attorney's fees in both the administrative and litigation phases of this matter.

48. In March of 1987 GE made formal written demand on Litton requesting that Litton indemnify GE for all past and future response costs incurred in cleaning up the site.

CONCLUSIONS OF LAW

This suit was brought under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 *et seq.* This Court has jurisdiction over the subject matter and parties and venue is proper. 42 U.S.C. §9613, 28 U.S.C. §1331. Any person, who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, shall be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan, including interest on the amounts recoverable. 42 U.S.C. §9607. In the instant case, GE's prima facie claim for cost recovery under §107(a)(4)(B) consists of the following elements:

1. Litton Business Systems, Inc. or Litton Industries, Inc. must fall within one of the four categories of "covered persons."

2. There must have been a release or a threatened release of hazardous substances from the site.

3. The release or threatened release must have caused General Electric Company to incur costs.

4. GE's costs must be necessary costs of response.

5. GE's response actions must be consistent with the national contingency plan.

See *Artesian Water Co. v. Government of New Castle County,* 659 F.Supp. 1269, 1278-9 (D.Del. 1987) *aff'd* 851 F.2d 643 (3rd Cir. 1988). Initially, defendant claims that plaintiff's action is barred by the equitable doctrine of unclean hands. Defendant

also contends that there was not a release or threatened release of hazardous substances from the site and that any costs incurred were "not necessary" nor "consistent with the national contingency plan." Litton also argues that GE acted as a volunteer and was not liable under CERCLA and therefore GE should not be allowed recovery.

Unclean Hands Defense

Defendant contends that plaintiff is barred from recovering the costs of the clean-up because subsequent to the discovery of the wastes, GE sold the property without disclosure of the previous dumping. The Court finds that the principle of unclean hands is not applicable to the facts of this case. This is not a suit between GE and a subsequent purchaser; this is a suit between GE (the subsequent innocent purchaser of Litton) and Litton, the party that dumped the materials. It is only when plaintiff's improper conduct is the source or part of the source of his equitable claim that he is to be barred because of the conduct. What is material is not that the plaintiff's hands are dirty but that he dirties them in acquiring the right he now asserts. *Kay v. Vatterott,* 657 S.W.2nd 80, 83 (Mo.App. 1983). An application of the unclean hands doctrine to the facts in this case would be an injustice.

Furthermore, it is doubtful whether the doctrine is applicable in CERCLA cases. *Smith Land and Import Corporation v. Celotex Corp.,* 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied* ____ U.S. ____ , 109 S.Ct. 837, 102 L.Ed.2d 969 (1989) [quoting *Chemical Waste Management v. Armstrong World Industries,* 669 F.Supp. 1285, 1291 n. 7 (E.D. Pa. 1987).] "Unclean hands" is not available as a defense in a suit at law. *Middleton Enterprises, Inc. v. Churm,* 618 F.Supp. 477, 479 (D.C. Mo. 1985) The fundamental purpose of CERCLA is to provide for the expeditious and efficacious clean-up of hazardous waste sites. *United States v. Conservation Chemical Company,* 628 F.Supp. 391, 404 (W.D. Mo. 1985). Congress intended and anticipated that potential responsible persons would accept and assume the responsibility to effect clean-up. *Id.* One legislative incentive for

doing so was availability of a private cause of action under §107 for response costs. *Id.* In this action. Litton has not been injured nor prejudiced by any actions of GE regarding the subsequent sale of the property. Application of the unclean hands defense in this context would turn congressional intent on its head. *Id.* The Court rejects defendant's contentions regarding the unclean hands defense.

Covered Person

Defendant contends that GE may not recover because GE was a "volunteer" not a covered person under CERCLA. Defendant misconstrues the statute. It is the defendant who must be a "covered person." A covered person is liable to "any other person." See 42 U.S.C. §9607. A covered person is any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed. 42 U.S.C. §9607(a)(2). At the time of the disposal, the site was owned by Royal McBee. The parties provided the following stipulation to the Court:

> 1. The Royal McBee Corporation ("Royal McBee"), operated a typewriter manufacturing facility at 2401 East Sunshine Street, Springfield, Missouri, between 1959 and 1965.
>
> 2. In 1965, pursuant to an agreement of merger, Royal McBee merged with Litton Industries, Inc. ("Litton"), a Delaware corporation, and Litton became the surviving corporation.
>
> 3. The Royal Typewriter Company, Inc., a wholly owned subsidiary of Litton, acquired the assets and liabilities of Royal McBee and continued to operate the typewriter manufacturing business at the above-referenced location from the date of the said merger in 1965 to approximately July 1967.
>
> 4. In approximately July 1967, Litton merged its wholly owned subsidiary, Royal Typewriter Company, Inc., into some other Litton wholly-owned subsidiaries, the

survivor of which became known as Litton Business Systems, Inc. ("LBSI").

5. During the period from 1959 through March, 1970, Royal McBee, Royal Typewriter Company, Inc. or LBSI owned the approximate 19 acre tract of vacant land immediately north of Sunshine and adjoining the Royal McBee typewriter facility to the immediate West. In approximately March, 1970, LBSI conveyed this tract to General Electric Company.

6. The Royal business at 2401 East Sunshine Street was closed by LBSI in 1969.

7. Effective August 1, 1988, Litton merged LBSI into Litton Industrial Automation Systems, Inc., a Delaware corporation ("LIASI").

8. Litton and LIASI currently are both duly authorized and existing corporations under the laws of the State of Delaware.

Plaintiff substituted Litton Industrial Automation System, Inc. as defendant in the current case.

A person is defined as an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity. . . . 42 U.S.C. §9601(21). The disposal and the current action occurred between 1958 and 1963. Therefore, LIASI is a person who owned or operated a facility at the time of disposal, and, as such, is the proper defendant in this action.

Release of Hazardous Substance From the Site

"Hazardous substance" means . . . (C) any hazardous waste having the characteristics identified under or listed pursuant to §3001 of the Solid Waste Disposal Act [42 U.S.C. §6921]. 42 U.S.C. §9601(14). The Solid Waste Disposal Act has been amended and §3001 may be found at 42 U.S.C. §6921 "identification and listing of hazardous waste." Section 6921 provides that the administrator (of the EPA) shall promulgate regulations identifying the characteristics of hazardous waste and listing

particular hazardous waste. 42 U.S.C. §6921(b)(1). A solid waste is a hazardous waste if:

> (1) it is not excluded from regulation as a hazardous waste under 261.4(b); and
>
> (2) it meets any of the following criteria:
>
> (i) it exhibits any of the characteristics of hazardous waste identified in subpart (c).
>
> (ii) it is listed in subpart (d) and has not been excluded from the list in subpart (d) under sections 260.20 and 260.22 of this chapter.

40 C.F.R. §261.3 (7/1/86 edition).

Subpart (c) defines characteristically hazardous substances — those which have the characteristics of ignitability, corrosivity, reactivity and EP toxicity. 40 C.F.R. §261.20 (7/1/86 edition). Subpart (d) contains lists of hazardous wastes. Except for the fourth drum, at issue in this case are the listed materials in subpart (d). Spent cyanide plating bath solutions from electroplating operations, plating bath residues from the bottom of plating baths from electroplating operations, where cyanides are used in the process, and spent stripping and cleaning bath solutions from electroplating operations, where cyanides are used in the process, are listed hazardous waste from nonspecific sources. 40 C.F.R. §261.31, FOO7-FOO9 (7/1/86 edition). [The Court is using the Code of Federal Regulations which was in effect at the time of the clean-up, however, the Court notes that the current edition of the Code of Federal Regulations contains FOO7-FOO9.]

The evidence in this case indicates that cyanide was used in the plating operations of Royal McBee. Two witnesses, Frank Carroll and Harold McKinnis, specifically recall depositing barrels with acid, bleach, cadmium plated sludge, chrome, zinc and cyanide products on the land in question in this suit. The witnesses' personal recollection is confirmed by the extensive testing which was completed by OH Materials on the composition of the land where the dumping occurred. Additionally, the analysis done by the MDNR indicated elevated levels of metals

and cyanide. The MDNR indicated that "current concentrations of chromium, copper, zinc, nickel and arsenic at the GE site represent a significant health threat and contaminated soil should be removed." The substance which was dumped on the GE site was a listed hazardous waste pursuant to subpart (d).

A "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping or disposing into the environment. 42 U.S.C. §9601(22). From 1958 to 1963, defendant dumped 500 gallons per year of waste chemicals on the ground in question. Additionally, as was ascertained at trial, a trench was used to bury a barrel which contained E.P. toxic material. A release of hazardous substances occurred.

The site is a "facility" because it is an area where hazardous substances have been deposited or come to be located. A facility is defined at §101(9) as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located." 42 U.S.C. §9601(9).

Defendant spent considerable time arguing that the substances are not "hazardous" by today's standards and should not have been considered hazardous in 1985. However, it would be improper for this Court to second-guess the listings propounded by the administrator of the EPA. This Court and the parties to this action were bound by the law as passed by Congress and the regulations as set forth in the Code of Federal Regulations. There would be no consistency in clean-ups if each court were to assess whether the EPA is correct in its regulations. If parties waited for a court to determine which waste is hazardous, any necessary clean-up would be delayed. In the present case, there would have been no clean-up or use of the present site four years after the MDNR declared "a significant health risk." The opinions of defendant's expert, Dr. Tardiff, are better suited for testimony before Congress or the EPA. For the purposes of this case, the cyanide plating bath solutions, residues, and the drums are defined as hazardous substances under CERCLA.

Defendant faults the plaintiff for not engaging its own toxicologist to dispute the standards as set by the Missouri Department of Natural Resources; however, employment of a

toxicologist was not necessary to comply with the National Contingency Plan. As noted above, the standards, which were set by the Missouri Department of Health, and relied upon by the MDNR, and finally acted upon by the plaintiff, cannot now be changed by this Court. In arguing that Missouri standards were followed by the plaintiff and not federal standards, the defendant overlooks the complex scheme of CERCLA which directly provides for state input. MDNR was the state agency which reports to the federal EPA. The EPA also adopted the MDNR recommendation as evidenced in plaintiff's Exhibit 220.

The promulgated Missouri Hazardous Waste Management Law, R.S.Mo. §260.350 et seq. (referred to as the "Missouri Superfund Statute"), including the provisions dealing with abandoned and uncontrolled sites, R.S.MO. §§260.435 through 260.550, and the regulations promulgated thereunder, 10 C.S.R. §25.10, are laws and regulations which were applicable or relevant and appropriate to the site and were therefore ARARs for the site. Clean-up levels for MDNR approved remedial actions under 10 C.S.R. §25-10.010(3) are set by the Missouri Department of Health (DOH) pursuant to the statutory delegation of powers in R.S.Mo. §260.445.5 which provides that the MDNR "shall utilize the department of health [DOH] when assessing the effects of an abandoned or uncontrolled site on human health." See plaintiff's Exhibit No. 253.

Finally, the Court notes the consent agreement between defendant and the EPA on the Fulbright/Sac River landfill. The credible testimony was that the same wastes were released on the Sunshine site and the Fulbright/Sac site. In particular, the Court finds that Mr. Theodore Craver, Litton's corporate representative in this case, executed an Administrative Order on Consent which contains numerous "Findings of Fact" and "Conclusions of Law" which are relevant herein. In particular, the Administrative Order on Consent, in evidence as plaintiff's Exhibit 254, provides in pertinent part:

> 5. The Royal McBee business, and its successor business(es), which operated at 2401 E. Sunshine Street in Springfield, Missouri disposed of or caused the disposal of

hazardous substances at the Fulbright Landfill between approximately 1962 and 1968 and at the Sac River Landfill. . . .

6. The hazardous substances which were disposed of at the Landfills by the Royal McBee business and/or its successor business(es) included spent acids and plating residues, among others. . . .

Release or Threatened Release Must Have Caused GE to Incur Costs

Although there is considerable debate over the necessity and amount of response costs, there does not appear to be a serious debate whether the release or threatened release of the hazardous substance caused GE to incur some costs. "The terms 'respond' or 'response' means remove, removal, remedy and remedial action, all such terms (including the terms 'removal' and 'remedial' action) include enforcement activities related thereto." 42 U.S.C. §9601(25). Plaintiff is claiming the cost of investigation, planning, monitoring and implementing the response actions as well as costs, attorney's fees and prejudgment interest. It was the intent of Congress that CERCLA be given a broad interpretation so as not to restrict the liability of those responsible parties. *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, 579 F.Supp. 823, 852 (W.D.Mo.1984). An award of prejudgment interest is not foreign to actions involving environmental statutes. *Id.* (citations omitted). Additionally, CERCLA specifically allows for the recovery of attorney's fees. At trial, defendant argued that GE had not presented a proper claim for attorney's fees. In the amended complaint filed on August 15, 1988, GE prayed for the following relief, "that this Court enter judgment in favor of General Electric and against Litton . . . in the amount of the costs of response incurred by General Electric, including interest and attorney's fees." Therefore, attorney's fees and predjugment interest will be properly recoverable as response costs.

Response Must Be Necessary and Consistent with NCP

Defendant's primary contention is that the response costs incurred by General Electric were neither necessary nor consistent with the National Contingency Plan.

Section 300.71 provides:

> (a)(1) Any person may undertake a response action to reduce or eliminate the release or threat of release of hazardous substances, or pollutants or contaminants. Section 107 of CERCLA authorizes persons to recover certain response costs consistent with this Plan from responsible parties.
>
> (2) For purposes of cost recovery under section 107 of CERCLA, . . . a response action will be consistent with the NCP if the person taking the response action:
>
> (i) Where the action is a removal action, acts in circumstances warranting removal and implements removal action consistent with §300.65.
>
> (ii) Where the action is a remedial action:
>
> (A) Provides for appropriate site investigation and analysis of remedial alternatives as required under §300.68;
>
> (B) Complies with the provisions of paragraphs (e) through (i) of §300.68;
>
> (C) Selects a cost-effective response; and
>
> (D) Provides an opportunity for appropriate public comment concerning the selection of a remedial action consistent with paragraph (d) of §300.67 unless compliance with the legally applicable or relevant and appropriate State and local requirements identified under paragraph (a)(4) of this section provides a ***substantially equivalent*** opportunity for public involvement in the choice of remedy (emphasis added).

* * *

> (4) Persons performing response actions that are neither Fund-financed nor pursuant to action under section 106 of CERCLA shall comply with all otherwise legally applicable or relevant and appropriate Federal, State and local requirements, including permit requirements.

Thus, a response action may be consistent with the NCP in either of two ways: as a removal or remedial action. Primarily, Litton argues that GE did not comply with the criteria for a remedial action. Litton argues that GE should have provided for public comment and that the remedy was too broad for the health risks involved. Defendant further argues that had a proper assessment been done, a more cost effective method, such as encapsulating the soil, would have been chosen.

The National Contingency Plan can be found at 40 C.F.R. 300.61 *et seq.* The National Contingency Plan specifically provides that no federal approval of any kind is a prerequisite to a cost recovery under §107. 50 Fed.Reg. 47934 (Nov. 20, 1985) (preamble to NCP). The NCP is a rule that presents the federal government's general plan or framework for responding to hazardous substances releases. The NCP is not intended to provide complex and detailed site-specific decisionmaking criteria. 50 Fed.Reg. 47920 (Nov. 20, 1985) (preamble to NCP). While some of the subpart is oriented toward federally funded response actions, the subpart may be used as *guidance* concerning methods and criteria for response actions by other parties under other funding mechanisms. 40 C.F.R. 300.61(e)(2). Except as provided in §300.71, nothing in this part limits the rights of any person to seek recovery of response costs from responsible parties pursuant to CERCLA §107. *Id.*

The Court finds that GE's action was consistent with the NCP as a removal action. Section 300.64 provides:

> (a) A preliminary assessment of a release or threat of a release identified for possible CERCLA response pursuant to §300.65 shall, as appropriate, be undertaken by the lead agency as promptly as possible. The lead agency shall, as appropriate, base the assessment on readily available information. This assessment may include but is not limited to:

(1) Identification of the source and nature of the release or threat of release;

(2) Evaluation by HHS or by other sources (e.g., State public health agencies) of the threat to public health;

(3) Evaluation of the magnitude of the potential threat;

(4) Evaluation of factors necessary to make the determination of whether a removal is necessary; and

(5) Determination if a non-Federal party is undertaking proper response.

* * *

(c) A preliminary assessment shall be terminated when the OSC or lead agency determines:

(1) There is no release or threat of release;

(2) The source is neither a vessel nor a facility;

(3) The release does not involve a hazardous substance, nor a pollutant or contaminant;

(4) The amount, quantity, and concentration released does not warrant Federal response;

(5) A party responsible for the release, or any other person, is providing appropriate response, and on-scene monitoring by the government is not required; or

(6) The assessment is completed.

In this action it is clear that the state public health agencies responsible for the evaluation of the threat to public health (the MDNR and DOH) concluded that the concentration of chromium, copper, zinc, nickel and arsenic at the General Electric site represented a significant health risk to the public's health. (Plaintiff's Exhibit 1). As the "lead agency", the MDNR also ascertained that health effects may occur as a result of exposure through ingestion of contaminated soils.

Defendant strenuously argues that the Missouri Department of Health assessment (Dr. Crellin's report) was an inaccurate assessment of the health risk. As noted above, those arguments are better addressed to the legislature, the Missouri Department of Natural Resources or the Missouri Department of Health. Section 300.65 provides that the lead agency shall first review the preliminary assessment and then have the responsible parties perform the necessary removal actions. DOH provided the preliminary assessment, DNR reviewed the assessment and GE performed the removal.

The regulations further provide:

> (b)(1) At any release, regardless of whether the site is included on the National Priorities List, where the lead agency determines that there is a threat to public health or welfare or the environment, based on the factors in paragraph (b)(2) of this section, the lead agency may take any appropriate action to abate, minimize, stabilize, mitigate, or eliminate the release or threat of release, or the threat resulting from the release or threat of release.
>
> (2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this subsection:
>
> (i) Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby populations, animals, or food chain;
>
> (ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
>
> (iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;
>
> (iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(vii) The availablity of other appropriate Federal or State response mechanisms to respond to the release [not applicable to private party responses];

(viii) Other situations or factors which may pose threats to public health or welfare or the environment.

40 C.F.R. 300.65

Again, as noted above, in this action the lead agency determined that there was a threat to the public health or welfare based upon the actual or potential exposure to hazardous substances primarily due to the high levels of hazardous substances or pollutants in soils at or near the surface. The agency determined that the "appropriate action" was to eliminate the release or threat of release. The Missouri Department of Natural Resources noted that with unrestricted land use a potential for future exposure does exist at that site and the "[c]lean-up at this site should be concerned with removal of soil to reduce concentrations of these contaminants to below the recommended safe soil level." It is clear to this Court that plaintiff implemented the removal action consistent with §300.65.

Next, defendant contends that plaintiff failed to comply with the remedial action provision of the NCP by not holding public hearings. Public hearings are not mandated in the NCP when compliance with legally applicable or relevant and appropriate state requirements provides a substantially equivalent opportunity for public involvement. The property in question was being developed for unrestricted land use. A consent decree was entered between MDNR and plaintiff. The MDNR monitored the appropriateness of the action throughout the clean-up. Additionally, the EPA found that enforcement action was needed by Missouri for the GE site and that "[R]eview of old data revealed that what was considered to be trace amounts in

1981 are now acknowledged as representing a threat to human health and environment."

It is clear to the Court that no public hearing was required due to the fact that GE was complying with legally applicable or relevant and appropriate state requirements that the waste be removed. Furthermore, if notice to the public is a requirement, the input of the Missouri Department of Natural Resources serves as a substitute for public comment. Defendant was specifically notified that a clean-up was necessary and that defendant was considered a responsible party. Statutes such as CERCLA which were enacted for the protection and preservation of public health are to be given an extremely liberal construction for the accomplishment of their beneficial objectives. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). "Courts will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise." *United States v. Aceto Agricultural Chemical Corp., et al.*, 872 F.2d 1373 (8th Cir. 1989) (quoting *Dedham*).

Furthermore, plaintiff complied with §300.71(1)(2)(i) by providing an appropriate site investigation and analysis of remedial alternatives as required under 300.68 when they hired OH Materials to do their site investigation. Defendant's claim that the site investigation done by OH Materials was not consistent with 300.65 has no merit. The regulations provide that a remedial investigation/feasible study (RI/FS) shall be undertaken by the lead agency to determine the nature and extent of the threat presented by the release and evaluate proposed remedies. 40 C.F.R. §300.68(d). That study is to include sampling, monitoring and exposure assessment. OH Materials provided an extensive sampling of the soil contained at the site. (See plaintiff's Exhibits 3, 4 and 5). The regulations specifically provide that during the remedial investigation, the original scoping of the project may be modified based upon the factors in §300.68(e). Modifications were made during the remediation.

Section 300.68(e) provides that the lead agency, in cooperation with the states, will examine available information and determine the type of response that may be needed to remedy

the release based upon the factors in Paragraph (e)(2) of §300.68. Subsection (e)(2) provides that the factors should be considered *as appropriate.* Defendant argued that several of the factors were not considered by the plaintiff in the scoping of response actions. For instance, defendant claims that the plaintiff did not consider the climate. The Court finds that the plaintiff considered all of the appropriate factors as evidenced by plaintiff's Exhibits 1 and 3 through 11. Furthermore, as evidenced in the preamble to the National Contingency Plan, the NCP "is a rule that presents the federal government's general plan or framework for responding to hazardous substance releases. The NCP in not intended to provide complex and detailed site-specific decisionmaking criteria. EPA has developed guidance on the feasibility study process and is developing additional addenda to that guidance to more fully detail the information to be considered in decision-making." 50 Fed.Reg. (Nov. 20, 1985) (preamble to NCP) (p. 43 Westlaw). EPA intends that the decisionmaking process to be used at each site to determine applicable or relevant and appropriate requirements should be, insofar as possible, straightforward enough to lead private parties to select remedies that protect public health and the environment. *Id.* at 43-44.

Consistency with the National Contingency Plan does not necessitate strict compliance with its provisions. *NL Industries, Inc. v. Kaplan,* 792 F.2d 896, 898-99 (9th Cir. 1986). Congress intended and anticipated that potentially responsible persons would accept and assume the responsibility to effect clean-up. *Conservation Chemical Company,* 628 F. Supp. at 405. Neither EPA approval nor national priorities listings are prerequisites for private recovery of response costs which are otherwise consistent with the NCP. *Conservation Chemical Co.* at 405. Because one of the major purposes of CERCLA is "*to induce such persons voluntarily* to pursue appropriate environmental response actions with respect to inactive hazardous waste sites," a private party need not await a government mandate or governmental approval to respond to a hazardous waste site. *United States v. Newcastle County,* 642 F. Supp. 1258, 1264 (D. Del. 1986) (emphasis in original) (quoting H. R. Rep. 1016, 96th

Cong. 2d Sess. 17, reprinted in 1980 U.S. Code Cong. Ad. News 6119, 6120).

In response to contaminated soil or waste – actions to remove, treat, or contain the soil or waste to reduce or eliminate the potential for hazardous substances or pollutants or contaminants to contaminate other media (ground water, surface water, or air) and to reduce or eliminate the potential for such substances to be inhaled, absorbed or ingested are considered appropriate actions. 40 C.F.R. §300.68(j)(3). An alternative that far exceeds the cost of other alternatives evaluated and that does not provide substantially greater public health or environmental protection or technical reliability shall usually be excluded from further consideration. However, an alternative that meets or exceeds applicable or relevant and appropriate federal public health and environmental requirements provides substantially greater protection than do alternatives that do not meet such requirements. 40 C.F.R. §300.68(g)(1). The analysis done by OH Materials showed that at the time the decision to remove the contaminants was made, not only was removal the most cost effective, it was mandated by the state standard. As noted above, under §300.71 plaintiff was obligated to comply with all otherwise legally applicable or relevant and appropriate federal, state and local requirements. EPA's policy statement was that compliance with applicable or relevant and appropriate requirements is necessary to provide adequate protection of human health and the environment. 50 Fed. Reg. 47916 (Nov. 20, 1985) (preamble to NCP). Any remedial action lesser than clean-up to background or DOH standards by removing the soil would not have been consistent with the NCP. "[T]he fact that [GE] sought and obtained the approval of DNR before beginning the clean-up and bringing this action indicates that [GE's] costs were consistent with the national contingency plan." *Anheuser-Busch v. Chas. Todd Corp.*, No. 85-236C(A) slip op. at 10 (E.D. Mo. November 4, 1987).

The credible evidence presented at trial convinces the Court that plaintiff engaged in a proper assessment of the potential hazard and evaluation of the alternative modes of remediation. Plaintiff then selected the remedy that was the

most cost effective in the long run. In making that decision, GE certainly considered that the land was to be used for development of an industrial park and that the contaminated area was thought to be relatively minor. GE was not aware that a trench had been dug and barrels had been buried on the site, necessitating an even greater clean-up. GE was realistic in its assessment that a clay cap would have been a temporary solution making the land unusable as an industrial park. Defendant had every opportunity to participate in the clean-up but failed to do so. Therefore, the Court finds that the plaintiff met its burden in showing that the defendant is a covered person, that a release of hazardous substance from the site occurred, that the release or threatened release caused plaintiff to incur costs, that those costs were necessary costs of the response and that the response actions were consistent with the NCP.

The NCP lists remedial actions which generally are appropriate for a given type of site. Furthermore, equity and the law dictate that the party responsible for the contamination be liable. The defendant, therefore, will be held liable for the cleanup on the "Sunshine" property.

Cost Analysis

Plainitiff presented documentation which indicates costs incurred by the plaintiff for the assessment and clean-up in the amount of $940,843.23. (Plaintiff spent $84,182.39 on the initial assessment, $5,100 on utility costs and $851,560.84 for the clean-up.) Under CERCLA prejudgment interest accrues "from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." 42 U.S.C. §9607(a). The plainitiff made written demand for its previously incurred response costs, excluding attorney's fees and court costs, at the initiation of its action against defendant, which was on June 19, 1987. All additional response costs, excluding attorney's fees and court costs, were incurred by September 9, 1988. Accordingly, these are the dates when interest commenced accruing.

Plaintiff submitted and defendant has not challenged the appropriate prejudgment interest. The Court accepts the calculations provided in Appendix A of plaintiff's post-trial brief for the appropriate interest rate. The total amount of interest is $134,788.87. The total amount of response costs, excluding attorney's fees and court costs with prejudgment interest to June 20, 1989 is $1,075,632.10.

Defendant argues the collateral benefit rule applies to this case. Assuming however that the "Collateral Benefit Rule" is a legally cognizable rule with potential application to GE, the Court finds its application to be factually unsupported. The apparent linchpin of Litton's "collateral benefit" argument is Litton's contention that GE knew at the time it purchased the subject property that it was acquiring industrial property with a dump prominently located thereon. The trial evidence failed to support this. There is no evidence in the record that the property was being used as a dump site at the time GE purchased the property in 1970. Moreover, Litton's dumping took place in a grassy field behind the row of trees which ran east and west across the property. There is no evidence that such dumping activities could have been viewed due to the high grasses, the location of the tree line, and the fact that the area of the dump was not visible from most points around the plant due to the tree line and grasses.

On June 6, 1989, defendant filed a document entitled "Constitutional Objections To the Issues Raised By Plaintiff." Defendant filed no suggestions in favor of the motion nor support at trial for the motion. The motion will be denied.

Accordingly, for the reasons set forth above, it is hereby

ORDERED that plaintiff shall within thirty (30) days from the entry of this order submit an itemization of the attorney's fees and costs incurred by plaintiff after June 19, 1987 at which time defendant shall be granted twenty (20) days to respond to plaintiff's itemization of costs incurred; and it is further

ORDERED that upon a determination of the amounts of attorney's fees and costs to which plaintiff is entitled to recover, judgment will be entered in favor of plaintiff and against defendant; and it is further

ORDERED that defendant's constitutional objections are denied for failure to comply with Local Rule 13(B).

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3333-CV-S-4

GENERAL ELECTRIC COMPANY,

Plaintiff,

vs.

LITTON INDUSTRIAL AUTOMATION
SYSTEMS, INC., et al.,

Defendants.

ORDER

Before the Court is the verified application of plaintiff for attorney's fees, expenses and prejudgment interest. Defendants filed suggestions in opposition to plaintiff's request for attorney's fees and, in the alternative, in support of a motion to produce. Defendants also have a motion to stay execution of judgment to waive the requirements of posting a supersedeas bond and a motion to consider constitutional objections to issues raised by plaintiff. Plaintiff has filed suggestions in opposition to the motion to produce, requesting a protective order, and suggestions in opposition to the motion to stay execution of judgment.

Defendants' motion to stay execution of the judgment and to waive the requirement of posting a supersedeas bond will be denied. Plaintiff's motion for protective order regarding defendants' document request for attorney fee documents will be granted. Defendants' motion to produce will be denied. Defendants will be ordered to provide the Court with an affidavit of defendants' attorney fee information, as set forth below. The Court would suggest the defendants use the very detailed application by plaintiff's attorneys including the hours billed per

month, the hours billed per person, the hourly rate, and activity breakdown and a breakdown of fees.

Defendants' motion to stay the execution of judgment to waive the requirement of posting a supersedeas bond argues that the defendants have sufficient assets as shown by the annual report of Litton to satisfy any judgment or portion thereof if affirmed on appeal. Defendants cite no case law or rules to support their position. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. Fed.R.Civ.P. 62(d). It has always been this Court's position that the plaintiff who has won at trial should not be put to the expense of defending a judgment on appeal unless the defendants take reasonable steps to assure that the judgment will be paid if it is affirmed. This case would be particularly ill-suited to waiving the requirement of a supersedeas bond when the evidence at trial showed a complicated series of corporate reorganizations and mergers. Therefore defendants' motion to stay the execution of judgment will be denied unless a supersedeas bond is posted. The Court cannot assess the amount of the bond until the attorney's fees are ascertained, however, the parties are advised that the bond shall be for the satisfaction of the whole amount of judgment, together with costs on appeal, interest and damages for delay.

Defendants filed a motion to produce all itemized bills submitted to plaintiff by its attorneys for attorneys fees and expenses, all time slips or any other written records supporting such bills, all vouchers and supporting documents indicating expenses paid, all cancelled checks indicating payment by plaintiff to its attorneys, the contract of employment between plaintiff and plaintiff's attorney relating to this case and all documents which itemize or detail any work done by plaintiff's experts in this case. Defendants claim that they are entitled to examine the documents requested so that they might analyze and if necessary contest the amount of attorney's fees and expenses claimed. Clearly, defendants' motion is overly broad. Defendants cite no cases for the proposition that defendants' counsel should be entitled to examine each and every document

and time slip and cross-examine plaintiff's counsel for justification of each hour claimed. Contrary to defendants' assertion that this case was not complicated, the Court notes that extensive discovery occurred, that defendants did not stipulate until the time of trial as to the successorship of the Litton corporations, and just weeks before trial, defendants informed the Court of their intentions to raise several issues which ultimately were not allowed at trial.

Attorneys are generally required to submit detailed affidavits which itemize and explain their fee claims. *Grunin v. International House of Pancakes,* 513 F.2d 114, 127 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975). Furthermore, the district courts should not become the inevitable haven for adversary proceedings concerning attorney's fees. *Moore v. City of Des Moines, Iowa,* 766 F.2d 343, 346 (8th Cir. 1985), *cert. denied,* 474 U.S. 1060 (1986). In this case it is clear that plaintiffs have complied with the *Grunin* criteria. Any further disclosure by the plaintiff could compromise plaintiff's position in further appeals. Therefore, defendants must produce to this Court affidavits supporting their contention that the attorney's fees are excessive and out of line for the work involved in this type of case. If, after reviewing defendants' affidavits, the Court feels that additional discovery is warranted, then both parties may be asked to produce documents in camera. Therefore, within ten days of the date of this order defendants' counsel must supply the Court with affidavits of the total number of hours and hourly rates charged by defendants' attorneys, paralegals and any expenses claimed by defendants.

Defendants have also filed a document entitled "Motion to Consider Consitutional Objections to Issues Raised by Plaintiff.' Defendants state that the purpose of the motion is to preserve the constitutional objections set forth during the trial. It is not entirely clear to the Court what specific facts or law the defendants are objecting to, however, defendants have supplied the Court with no cases to substantiate their "constitutional" objections. Defendants' assertion that "the facts upon which the constitutional objection was raised absolutely unique" [sic] has no merit. If the defendants are concerned about preserving their

constitutional objection, the Court finds that the defendants have not made clear the specific constitutional objections. If, during the trial, defendants did make appropriate constitutional objections, the Court will stand on the rulings made at that time.

Finally, the Court will amend the order entered on June 20, 1989 which names only Litton Business Systems, Inc. (LBSI) as a defendant to reflect that defendants, Litton Industries, Inc. (Litton) and Litton Industrial Automation Systems, Inc. (LIASI) are the appropriate defendants. Accordingly, it is

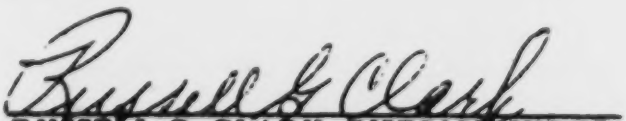
ORDERED that plaintiff's motion for protective order is granted; and it is further

ORDERED that defendants' motion to produce is denied; and it is further

ORDERED that defendants' motion to stay execution of judgment and to waive the requirement of posting a supersedeas bond is denied; and it is further

ORDERED that defendants produce affidavits reflecting the total amount, the total number of hours, and the charge per hour for all attorney's fees, paralegal fees and expenses for any attorney involved in this litigation; and it is further

ORDERED that the Clerk of Court substitute LIASI for LBSI and add Litton Industries, Inc. as party defendants.



RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: August 7, 1989

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3333-CV-S-4

GENERAL ELECTRIC COMPANY,

Plaintiff,

vs.

LITTON INDUSTRIAL AUTOMATION
SYSTEMS, INC., et al.,

Defendants.

ORDER

Before the Court is plaintiff's application for attorneys' fees, expenses and prejudgment interest. Plaintiff's application will be granted as set forth below.

On June 20, 1989, the Court entered an order in the above-captioned case stating that upon a determination of the amount of attorneys' fees and costs plaintiff is entitled to recover, judgment would be entered in favor of plaintiff. *General Electric Co.* v. *Litton Business Systems, Inc.*, 715 F.Supp. 949, 964 (W.D. Mo. 1989). The Court gave plaintiff thirty days to submit an itemization of attorneys' fees and costs incurred by plaintiff after June 19, 1987. *Id.* Plaintiff has submitted such an itemization requesting attorneys' fees and expenses, plus interest, both prior and subsequent to the filing of this suit on June 19, 1987.

Post-Filing Attorneys' Fees

Plaintiff argues that it is entitled to attorney's fees for services performed subsequent to the filing of suit pursuant to 42 U.S.C. § 9607(a)(4)(B), or, in the alternative, pursuant to Fed.R.Civ.P. 11 and 37 (c). This Court has previously determined that attorneys' fees are recoverable by the United States

government in a cost recovery action. *United States* v. *Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F.Supp. 823, 851-52 (W.D. Mo. 1984), *aff'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Defendant responds that attorneys' fees are not recoverable pursuant to 42 U.S.C. § 9607(a)(4)(B) in a private cost recovery action under CERCLA. The Court has previously determined that attorneys' fees are properly recoverable by plaintiff as response costs. *General Electric Co.*, 715 F.Supp. at 958-59.

Plaintiff seeks to recover $269,475.57 in attorneys' fees for services performed subsequent to the filing of suit. In determining the proper amount of reasonable attorneys' fees the Court must consider the twelve factors enumerated in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), that have been adopted and expressly followed by the Eighth Circuit. *E.g.*, *Hardman* v. *Board of Education of Dollarway, Arkansas School District*, 714 F.2d 823, 825 (8th Cir. 1983). The Court must determine if the number of hours claimed and the hourly rate charged are reasonable. Plaintiff requests attorneys' fees for 2,663.03 hours expended by partners, associates, of counsel attorneys, legal assistants, law clerks, and librarians. *See* Plaintiff's Verified Application for Attorneys' Fees, Expenses, and Prejudgment Interest ("Plaintiff's Application") at Exhibits C, D. The Court finds that the hours listed by plaintiff are reasonable for a complex CERCLA case where the Court has previously acknowledged that "extensive discovery occurred, that defendants did not stipulate until the time of trial as to the successorship of the Litton corporations, and just weeks before trial, defendants informed the Court of their intentions to raise several issues which ultimately were not allowed at trial." *General Electric Co.*, Order of August 7, 1989, at 3; *see* Plaintiff's Application at Exhibits F, G, H. Therefore, the Court will approve the 2,663.03 hours listed by plaintiff as reasonable. The hourly rates claimed by plaintiff vary from $25 per hour for an assistant librarian to $195 per hour for a partner. *Id.* at Exhibit E. The Court finds that the hourly rates charged for partners George P. Coughlin, John J. Yates and Paul Scott Kelly, Jr., for 1989 are excessive. Mr. Coughlin was billed at

$143 per-hour, Mr. Yates at $150 per hour and Mr. Kelly at $195 per hour. *Id.* The Court will approve an hourly rate of $135 for these three partners. The Court finds that the hourly rates charged for the remaining persons for this complex CERCLA case are reasonable for the Springfield, Missouri, area. *See id.* at Exhibits D, E. Therefore, the Court will approve the hourly rates as modified above as reasonable. As a result, the Court will award plaintiff attorneys' fees in the amount of $269,406.52 for services performed subsequent to the filing of suit.

Pre-Filing Attorneys' Fees

Plaintiff seeks $42,536.80 in attorneys' fees for services performed prior to the filing of this suit on June 19, 1987, in connection with the administrative proceedings before the Missouri Department of Natural Resources and legal advice to guide the site cleanup. The Court has previously acknowledged that plaintiff incurred such attorneys' fees. *General Electric Co.*, 715 F.Supp. at 955. Once liability has been established under CERCLA, a covered person "shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). "Response" is defined as "removal, remedy, and remedial action, *all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.*" *Id.* § 9601(25) (emphasis added). Thus, the "costs of response" recoverable under 42 U.S.C. § 9607(a)(4)(B) include enforcement activities related to removal or remedial action, which would allow recovery of pre-filing attorneys' fees as enforcement activities related to removal or remedial action. *See BCW Associates, Ltd.* v. *Occidental Chemical Corp.*, No. 86-5947, slip op. at 55 n.4 (E.D. Pa. Sept. 24, 1988) (WESTLAW, DCT database); *Bulk Distribution Centers, Inc.* v. *Monsanto Co.*, 589 F.Supp. 1437, 1452 (S.D. Fla. 1984). Because of the complexity of site evaluation and cleanup under CERCLA, substantial attorneys' fees may be incurred prior to the actual filing of a CERCLA cost recovery action. "Congress

has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up." *Northeastern Pharmaceutical*, 579 F.Supp. at 848. Such costs include attorneys' fees prior to the filing of a lawsuit. Because the Court is "obligated to construe [CERCLA's] provisions liberally to avoid frustration of the beneficial legislative purposes," *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (citations omitted), the Court finds that plaintiff is entitled to recover pre-filing attorneys' fees.

Plaintiff seeks to recover $42,536.80 in attorneys' fees for services performed prior to the filing of suit. Plaintiff requests attorneys' fees for 415.26 hours expended by partners, associates, of counsel attorneys and librarians. Plaintiff's Application at Exhibits K, L. The Court finds that the hours listed by plaintiff are reasonable for complex pre-litigation CERCLA activities. *See id.* at Exhibits 0, P. Therefore, the Court will approve the 415.26 hours listed by plaintiff as reasonable. The hourly rates claimed by plaintiff vary from $25 for an assistant librarian to $165 per hour for a partner. *Id.* at Exhibit M. The Court finds that the hourly rate of $165 charged for Mr. Kelly is excessive. The Court will once again approve an hourly rate of $135 for Mr. Kelly. Mr. Kelly billed .5 hours at $165 per hour for a total bill of $82.50. *Id.* at Exhibits L, M. At a rate of $135 per hour the bill would be $67.50, resulting in a $15 reduction of plaintiff's attorneys' fee claim. The Court finds that the hourly rates charged for the remaining persons for the complex pre-litigation CERCLA activities are reasonable for the Springfield, Missouri, area. *See id.* at Exhibit M. Therefore, the Court will approve the hourly rates as modified above as reasonable. As a result, the Court will award plaintiff attorneys' fees in the amount of $42,521.80 for services rendered prior to the filing of suit.

Post-Filing Expenses

Plaintiff seeks $75,974.09 in expenses incurred subsequent to the filing of suit. *Id.* at Exhibit S. The request includes

expenses for air courier, computer research, depositions, facsimile transmissions, long distance telephone calls, photographs, exhibit preparation, photocopies, postage, travel, witness fees and other miscellaneous expenses. *Id.* The Court finds such expenses are reasonable for a complex CERCLA case. As the Court has previously determined that plaintiff is entitled to recover post-filing attorneys' fees, the Court will allow plaintiff to recover expenses in the amount of $75,974.09 for expenses incurred subsequent to the filing of suit.

Pre-Filing Expenses

Plaintiff seeks $4,201.32 in expenses incurred prior to the filing of suit. *Id.* at Exhibit T. The request includes expenses for air courier, computer research, long distance telephone calls, photocopies, postage, travel and other miscellaneous expenses. *Id.* The Court finds such expenses are reasonable for complex pre-litigation CERCLA activities. Once again, as the Court has previously determined that plaintiff is entitled to recover pre-filing attorneys' fees, the Court will allow plaintiff to recover expenses in the amount of $4,201.32 for expenses incurred prior to the filing of suit.

Prejudgment Interest

Previously, this Court awarded plaintiff prejudgment interest on response costs. *General Electric Co.*, 715 F.Supp. at 963. As the Court has defined "response costs" to include attorneys' fees and expenses previously in this order, the Court will award plaintiff prejudgment interest on attorneys' fees and expenses. The Court has awarded plaintiff attorneys' fees totaling $311,928.32 and expenses totaling $80,175.41. Under CERCLA prejudgment interest accrues "from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." 42 U.S.C. § 9607(a). As a result, the Court disagrees with plaintiff's prejudgment interest calculations regarding pre-filing attorneys' fees and expense payments by plaintiff. *See* Plaintiff's Application at Exhibits U,

V. Plaintiff calculates prejudgment interest from the date payment was made by plaintiff. Plaintiff made written demand for previously incurred response costs, which includes attorneys' fees and expenses, when this action was filed on June 19, 1987. Therefore, this date is later than "the date of the expenditure concerned" regarding pre-filing payments of attorneys' fees and expenses by plaintiff and, pursuant to 42 U.S.C. § 9607(a), is the controlling date for calculation of prejudgment interest on these amounts. Plaintiff's prejudgment interest calculations regarding post-filing attorneys' fees and expense payments are correct, as the later date is "the date of the expenditure concerned." Accordingly, plaintiff will be awarded $27,361.22 in prejudgment interest on attorneys' fees and expenses for a total attorneys' fees and expenses award of $419,464.95.

Other Response Costs

This Court previously determined that judgment would be entered in favor of plaintiff against defendant upon a determination of the amount of attorneys' fees and costs which plaintiff is entitled to recover. *General Electric Co.*, 715 F.Supp. at 964. Plaintiff incurred $940,843.23 in response costs, excluding attorneys' fees and expenses. Judgment will now be entered accordingly. *Id.* at 963. In addition, plaintiff will be awarded prejudgment interest in the amount of $161,945.65 for a total award of $ 1,102,788.88 excluding attorneys' fees and expenses.

Accordingly, it is hereby

ORDERED that plaintiff's verified application for attorneys' fees, expenses and prejudgment interest is granted as set forth in this order; and it is further

ORDERED that plaintiff is awarded $419,464.95 in attorneys' fees, and expenses, including prejudgment interest; and it is further

ORDERED that judgment be entered in favor of plaintiff for response costs including prejudgment interest totaling $1,102,788.88 for a total judgment in the amount of $1,522,253.83.

Russell G. Clark

RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: October 24, 1989

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3333-CV-S-4

GENERAL ELECTRIC COMPANY,

Plaintiff,

vs.

LITTON INDUSTRIAL AUTOMATION
SYSTEMS, INC. and LITTON
INDUSTRIES, INC.,

Defendants.

ORDER

On October 24, 1989, the Court entered judgment in the above-captioned case in favor of plaintiff against defendant Litton Business Systems, Inc., et al., in the amount of $1,522,253.83. However, the Court recognized in its order of August 7, 1989, that the appropriate defendants are Litton Industries, Inc., and Litton Industrial Automation Systems, Inc. Therefore, the Court will amend the judgment entered on October 24, 1989, in the above-captioned case to reflect that Litton Industries, Inc., and Litton Industrial Automation Systems, Inc., are the appropriate defendants.

Accordingly. it is hereby

ORDERED that judgment entered in the above-captioned case is amended to reflect Litton Industries, Inc., and Litton Industrial Automation Systems, Inc., as the appropriate judgment debtors.

Russell G Clark

RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: Nov. 1, 1989

Relevant Provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

CERCLA §101 (42 U.S.C. §9601). Definitions

For the purpose of this subchapter—

* * *

(23) The terms "remove" or "removal" means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

(24) The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation or reactive wastes, dredging or excavations,

repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" and "response" means [sic] remove, removal, remedy, and remedial action; all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * *

CERCLA §104 (42 U.S.C. §9604). Response authorities

* * *

(b) Investigation, monitoring, etc., by President

(1) Information; studies and investigations

Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent

of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

(2) Coordination of investigations

The President shall promptly notify the appropriate Federal and State natural resources trustees of potential damages to natural resources resulting from releases under investigation pursuant to this section and shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees.

* * *

CERCLA §107 (42 U.S.C. §9607). Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

* * *

CERCLA §117 (42 U.S.C. §9617). Public participation

(a) Proposed plan

Before adoption of any plan for remedial action to be undertaken by the President, by a State, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.

(2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings under section 9621(d)(4) of this title (relating to cleanup standards). The President or the State shall keep a transcript of the meeting and make such transcript available to the public.

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.

(b) Final plan

Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations under subsection (a) of this section.

(c) Explanation of differences

After adoption of a final action plan—

(1) if any remedial action is taken,

(2) if any enforcement action under section 9606 of this title is taken, or

(3) if any settlement or consent decree under section 9606 of this title or section 9622 of the title is entered into,

and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made.

(d) Publication

For the purposes of this section, publication shall include, at a minimum, publication in a major local newspaper of general circulation. In addition, each item developed, received, published, or made available to the public under this section shall be available for public inspection and copying at or near the facility at issue.

(e) Grants for technical assistance

(1) Authority

Subject to such accounts as are provided in appropriations Acts and in accordance with rules promulgated by the President, the President may make grants available to any group of individuals which may be affected by a release or threatened release at any facility which is listed in the National Priorities List under the National Contingency Plan. Such grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility.

(2) Amount

The amount of any grant under this subsection may not exceed $50,000 for a single grant recipient. The President may

waive the $50,000 limitation in any case where such waiver is necessary to carry out the purposes of this subsection. Each grant recipient shall be required, as a condition of the grant, to contribute at least 20 percent of the total of costs of the technical assistance for which such grant is made. The President may waive the 20 percent contribution requirement if the grant recipient demonstrates financial need and such waiver is necessary to facilitate public participation in the selection of remedial action at the facility. Not more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action.

CERCLA §310 (42 U.S.C. §9659). Citizens suits

(a) Authority to bring civil action

Except as provided in subsection (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development, and demonstration).

(b) Venue

(1) Actions under subsection (a)(1)

Any action under subsection (a)(1) of this section shall be brought in the district court for the district in which the alleged violation occurred.

(2) Actions under subsection (a)(2)

Any action brought under subsection (a)(2) of this section may be brought in the United States District Court for the District of Columbia.

(c) Relief

The district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) of this section to order the President or other officer to perform the act or duty concerned.

(d) Rules applicable to subsection (a)(1) actions

(1) Notice

No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) Diligent prosecution

No action may be commenced under paragraph (1) of subsection (a) of this section if the President has commenced and is diligently prosecuting an action under this chapter, or under the Solid Waste Disposal Act [42 U.S.C.A §6901 et seq.] to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

(e) Rules applicable to subsection (a)(2) actions

No action may be commenced under paragraph (2) of subsection (a) of this section before the 60th day following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

(f) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent in accordance with the Federal Rules of Civil Procedure.

(g) Intervention

In any action under this section, the United States or the State, or both, if not a part may intervene as a matter of right. For other provisions regarding intervention, see section 9613 of this title.

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).

(i) Definitions

The terms used in this section shall have the same meanings as when used in subchapter I of this chapter.

Relevant Provisions of the 1985 National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP)

40 C.F.R. §300.65 (1988) Removals.

(a)(1) In determining the appropriate extent of action to be taken at a given release, the lead agency shall first review the preliminary assessment and the current site conditions to determine if removal action is appropriate.

(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable considering the exigencies of the circumstances, to have them perform the necessary removal actions. Where responsible parties are unknown, an effort initially shall be made, to the extent practicable considering the exigencies of the circumstances, to locate them and have them perform the necessary removal action.

(3) This section does not apply to removal actions taken pursuant to section 104(b) of CERCLA. The criteria for such actions are set forth in section 104(b).

(b)(1) At any release, regardless of whether the site is included on the National Priorities List, where the lead agency determines that there is a threat to public health or welfare or the environment, based on the factors in paragraph (b)(2) of this section, the lead agency may take any appropriate action to abate, minimize, stabilize, mitigate, or eliminate the release or threat of release, or the threat resulting from that release or threat of release.

(2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this subsection:

(i) Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby populations, animals, or food chain;

(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii) Hazardous substances of pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(vii) The availability of other appropriate Federal or State response mechanisms to respond to the release;

(viii) Other situations or factors which may pose threats to public health or welfare or the environment.

(3) Removal actions, other than those authorized under section 104(b) of CERCLA, shall be terminated after $1 million has been obligated for the action or six months have elapsed from the date of initial response, unless the lead agency determines that;

(i) There is an immediate risk to public health or welfare or the environment;

(ii) Continued response actions are immediately required to prevent, limit, or mitigate an emergency; and

(iii) Such assistance will not otherwise be provided on a timely basis.

(4) If the lead agency determines that a removal action pursuant to this subsection is appropriate, actions shall, as appropriate, begin as soon as possible to prevent, minimize, or mitigate the threat to public health or welfare or the environment. The lead agency shall, at the earliest possible time, also make any necessary determinations contained in paragraph (b)(3) of this section.

(c) The following removal actions are, as a general rule, appropriate in the following situations; however, this list does not limit the lead agency from taking any other actions deemed necessary in response to any situation or preclude the lead agency from deferring response action to other appropriate Federal or State enforcement or response authorities;

(1) Fences, warning signs, or other security or site control precautions – where humans or animals have access to the release;

(2) Drainage controls (e.g., run-off or run-on diversion) – where precipitation or run-off from other sources (e.g., flooding) may enter the release area from other areas;

(3) Stabilization of berms, dikes, or impoundments – where needed to maintain the integrity of the structures;

(4) Capping of contaminated soils or sludges – where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground water, or air;

(5) Using chemicals and other materials to retard the spread of the release or to mitigate its effects – where the use of such chemicals will reduce the spread of the release;

(6) Removal of highly contaminated soils from drainage or other areas – where removal will reduce the spread of contamination;

(7) Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants – where it will reduce the likelihood of spillage, leakage, exposure to humans, animals or food chain, or fire or explosion;

(8) Provision of alternative water supply – where it will reduce the likelihood of exposure of humans or animals to contaminated water.

(d) Where necessary to protect public health or welfare, the lead agency will request that FEMA conduct a temporary relocation or evacuation.

(e) If the lead agency determines that the removal action will not fully address the threat or potential threat posed by the release and the release may require remedial action, the lead agency shall ensure an orderly transition from removal to remedial response activities.

(f) Although Fund-financed removal actions and removal actions pursuant to CERCLA section 106 are not required to comply with other Federal, State and local laws governing the removal activity, including permit requirements, such removal actions shall, to the greatest extent practicable considering the exigencies of the circumstances, attain or exceed applicable or relevant and appropriate Federal public health and environmental requirements. Other Federal criteria, advisories, and guidance and State standards also shall, as appropriate, be considered in formulating the removal action.

(g) Fund-financed removal actions and removal actions pursuant to section 106 of CERCLA involving the storage, treatment, or disposal of hazardous substances or pollutants or contaminants at off-site facilities shall involve only off-site facilities that are operating under appropriate Federal or State permits or authorization and other legal requirements.

(h) Removal actions pursuant to section 106 of CERCLA are exempt from the following requirements of this section;

(1) Section 300.65(a)(2) requirement to locate responsible parties and have them undertake the response.

(2) Section 300.65(b)(2)(vii) requirement to consider the availability of other appropriate Federal or State response and enforcement mechanisms to respond to the release.

(3) Section 300.65(b)(3) requirement to terminate response after $1 million has been obligated or six months have elapsed from the date of the initial response.

(i) Other private party responses not pursuant to section 106 of CERCLA are exempt from paragraphs (b)(2)(vii) and (b)(3) of this section.

40 C.F.R. §300.67 (1988) Community Relations.

* * *

(d) In remedial actions at NPL sites, including Fund-financed and enforcement actions, feasibility studies that outline alternative remedial measures must be provided to the public for review and comment for a period of not less than 21 calendar days. Such review and comment shall precede selection of the remedial response. Public meeting(s) shall, in most circumstances, be held during the comment period. The lead agency may also provide the public with an opportunity to comment during the development of the feasibility study.

* * *

40 C.F.R. §300.68 (1988) Remedial Action.

(a) *Introduction.* (1) Remedial actions are those responses to releases that are consistent with permanent remedy to prevent or minimize the release of hazardous substances or pollutants or contaminants so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment [see CERCLA section 101(24)]. Fund-financed remedial action, excluding remedial planning activities pursuant to CERCLA section 104(b), may be taken only at sites listed on the NPL.

(2) The Remedial Project Manager (RPM) shall carry out responsibilities in a remedial action as delineated in §300.33(b).

(3) Federal, State, and local permits are not required for Fund-financed remedial action or remedial actions taken pursuant to Federal action under section 106 of CERCLA. However, remedial actions that involve storage, treatment, or disposal of hazardous substances or pollutants or contaminants at off-site facilities shall involve only such off-site facilities that are operating under appropriate Federal or State permits or authorization and other legal requirements.

(b) *State involvement.* (1) States are encouraged to undertake Fund-financed remedial response in accordance with §300.62 of this Plan.

(2) States must meet the requirements of CERCLA section 104(c)(3) prior to initiation of a Fund-financed remedial action.

(3) Planning activities associated with remedial actions taken pursuant to CERCLA section 104(b) shall not require a State cost share unless the facility was owned at the time of any disposal of hazardous substances therein by the State or a political subdivision thereof. Such planning activities include, but are not limited to, remedial investigations, feasibility studies, and design of the proposed remedy. For sites owned by a State or its political subdivision, cost sharing commitment is required prior to remedial action.

(c) *Operable unit.* Response action may be conducted in operable units. Operable units may be conducted as remedial and/or removal actions.

(1) Response actions may be separated into operable units consistent with achieving a permanent remedy. These operable units may include removal actions pursuant to §300.65(b), and/or remedial actions involving source controls, and/or management of migration.

(2) The RPM shall, as appropriate, recommend whether or not operable units should be implemented prior to selection of the appropriate final remedial measure.

(3) Implementation of operable units may begin before selection of an appropriate final remedial action if such measures are cost-effective and consistent with a permanent remedy. Compliance with §300.68(b) is a prerequisite to implementing remedial operable units.

(d) *Remedial Investigation/Feasibility Study* (RI/FS). An RI/FS shall, as appropriate, be undertaken by the lead agency conducting the remedial action to determine the nature and extent of the threat presented by the release and to evaluate proposed remedies. This includes sampling, monitoring, and exposure assessment, as necessary, and includes the gathering of sufficient information to determine the necessity for and proposed extent of remedial action. Part of the RI/FS may involve

assessing whether the threat can be prevented or minimized by controlling the source of the contamination at or near the area where the hazardous substances were originally located (source control measures) and/or whether additional actions will be necessary because the hazardous substances have migrated from the area of or near their original location (management of migration). Planning for remedial action at these releases shall, as appropriate, also assess the need for removals. During the remedial investigation, the original scoping of the project may be modified based on the factors in §300.68(e).

(e) *Scoping of response actions during the remedial investigation.* (1) The lead agency, in cooperation with the State(s), will examine available information and determine, based on the factors indicated in paragraph (e)(2) of this section, the type of response that may be needed to remedy the release. This scoping will serve as a basis for requesting funding for a necessary removal action and may serve as the basis for further supporting funding requests for a remedial investigation or feasibility study. Initial analysis shall indicate the extent to which the release or threat of release may pose a threat to public health or welfare or the environment, indicate the types of removal measures and/or remedial measures suitable to abate the threat, and set priorities for implementation of the measures. Initial analysis shall, as appropriate, also provide a preliminary determination of the extent to which Federal environmental and public health requirements are applicable or relevant and appropriate to the specific site and the extent to which other Federal criteria, advisories, and guidelines and State standards are to be used in developing the remedy.

(2) The following shall, as appropriate, be assessed in determining whether and what type of remedial and/or removal actions will be considered:

(i) Population, environmental, and welfare concerns at risk;

(ii) Routes of exposure;

(iii) Amount, concentration, hazardous properties, environmental fate and transport (e.g., ability and opportunities to

bioaccumulate, persistence, mobility, etc.), and form of the substance(s) present;

(iv) Hydrogeological factors (e.g., soil permeability, depth to saturated zone, hydrologic gradients, proximity to a drinking water aquifer, floodplains and wetlands proximity);

(v) Current and potential ground water use (e.g., the appropriate ground water classes under the system established in the EPA Ground-Water Protection Strategy);

(vi) Climate (rainfall, etc.);

(vii) The extent to which the source can be adequately identified and characterized;

(viii) Whether substances at the site may be reused or recycled;

(ix) The likelihood of future releases if the substances remain on-site;

(x) The extent to which natural or man-made barriers currently contain the substances and the adequacy of the barriers;

(xi) The extent to which the substances have migrated or are expected to migrate from the area of their original location, or new location if relocated, and whether future migration may pose a threat to public health welfare or the environment;

(xii) The extent to which Federal environmental and public health requirements are applicable or relevant and appropriate to the specific site, and the extent to which other Federal criteria, advisories, and guidance and State standards are to be considered in developing the remedy;

(xiii) The extent to which contamination levels exceed applicable or relevant and appropriate Federal requirements or other Federal criteria, advisories, and guidance and State standards;

(xiv) Contribution of the contamination to an air, land, water, and/or food chain contamination problem;

(xv) Ability of responsible party to implement and maintain the remedy until the threat is permanently abated;

(xvi) For Fund-financed responses, the availability of other appropriate Federal or State response and enforcement mechanisms to respond to the release; and

(xvii) Other appropriate matters may be considered.

(3) As a remedial investigation progresses, the project may be modified if the lead agency determines that, based on the factors in §300.68(e)(2), such modifications would be appropriate.

(f) *Development of alternatives.* (1) To the extent that it is both possible and appropriate, at least one remedial alternative shall be developed as part of the feasibility study (FS) in each of the following categories:

(i) Alternatives for treatment or disposal at an off-site facility, as appropriate;

(ii) Alternatives that attain applicable or relevant and appropriate Federal public health and environmental requirements;

(iii) As appropriate, alternatives that exceed applicable or relevant and appropriate Federal public health and environmental requirements;

(iv) As appropriate, alternatives that do not attain applicable or relevant and appropriate Federal public health and environmental requirements but will reduce the likelihood of present or future threat from the hazardous substances and that provide significant protection to public health and welfare and the environment. This must include an alternative that closely approaches the level of protection provided by the applicable or relevant and appropriate requirements;

(v) No action alternative.

(2) These alternatives, including those in paragraph (f)(1)(iv) of this section, shall, as appropriate, be developed based upon the analysis conducted under paragraphs (c), (d), and (e) of this section. The alternatives shall, as appropriate, consider and integrate waste minimization, destruction, and recycling.

(g) *Initial screening of alternatives.* The alternatives developed under paragraph (f) of this section will be subject to an initial screening to narrow the list of potential remedial actions for further detailed analysis. When an alternative is eliminated in screening, the rationale shall be documented in the feasibility study. Three broad criteria shall, as appropriate, be used in the initial screening of alternatives:

(1) *Cost.* For each alternative, the cost of implementing the remedial action must be considered, including operation and maintenance costs. An alternative that far exceeds the costs of other alternatives evaluated and that does not provide substantially greater public health or environmental protection or technical reliability shall usually be excluded from further consideration. For purposes of this paragraph, an alternative that meets or exceeds applicable or relevant and appropriate Federal public health and environmental requirements provides substantially greater protection than do alternatives that do not meet such requirements.

(2) *Acceptable engineering practices.* Alternatives must be feasible for the location and conditions of the release, applicable to the problem, and represent a reliable means of addressing the problem.

(3) *Effectiveness.* Those alternatives that do not effectively contribute to the protection of public health and welfare and the environment shall not be considered further. If an alternative has significant adverse effects, and very limited environmental benefits, it shall also be excluded from further consideration.

(h) *Detailed analysis of alternatives.* (1) A more detailed evaluation will be conducted of the limited number of alternatives that remain after the initial screening in §300.68(g).

(2) The detailed analysis of each alternative shall, as appropriate, include:

(i) Refinement and specification of alternatives in detail, with emphasis on use of established technology. Innovative or advanced technology shall, as appropriate, be evaluated as an alternative to conventional technology;

(ii) Detailed cost estimation, including operation and maintenance costs, and distribution of costs over time;

(iii) Evaluation in terms of engineering implementation, reliability, and constructability;

(iv) An assessment of the extent to which the alternative is expected to effectively prevent, mitigate, or minimize threats to, and provide adequate protection of public health and welfare and the environment. This shall include an evaluation of the

extent to which the alternative attains or exceeds applicable or relevant and appropriate Federal public health and environmental requirements. Where the analysis determines that Federal public health and environmental requirements are not applicable or relevant and appropriate, the analysis shall, as appropriate, evaluate the risks of the various exposure levels projected or remaining after implementation of the alternative under consideration;

(v) An analysis of whether recycle/reuse, waste minimization, waste biodegradation, or destruction or other advanced, innovative, or alternative technologies is appropriate to reliably minimize present or future threats to public health or welfare or the environment;

(vi) An analysis of any adverse environmental impacts, methods for mitigating these impacts, and costs of mitigation.

(3) In performing the detailed analysis of alternatives, it may be necessary to gather additional data to complete the analysis.

(i) *Selection of remedy.* (1) The appropriate extent of remedy shall be determined by the lead agency's selection of a cost-effective remedial alternative that effectively mitigates and minimizes threats to and provides adequate protection of public health and welfare and the environment. Except as provided in §300.68(i)(5), this will require selection of a remedy that attains or exceeds applicable or relevant and appropriate Federal public health and environmental requirements that have been identified for the specific site.

(2) In selecting the appropriate extent of remedy from among the alternatives that will achieve adequate protection of public health and welfare and the environment in accordance with §300.68(i)(1), the lead agency will consider cost, technology, reliability, administrative and other concerns, and their relevant effects on public health and welfare and the environment.

(3) If there are no applicable or relevant and appropriate Federal public health or environmental requirements, the lead agency will select that cost-effective alternative that effectively mitigates and minimizes threats to and provides adequate

protection of public health and welfare and the environment, considering cost, technology, and the reliability of the remedy.

(4) Pertinent other Federal criteria, advisories, and guidance and State standards will be considered and may be used in developing alternatives, with adjustments for site-specific circumstances.

(5) Notwithstanding §300.68(i)(1), the lead agency may select an alternative that does not meet applicable or relevant and appropriate Federal public health or environmental requirements in any of the following circumstances:

(i) The selected alternative is not the final remedy and will become part of a more comprehensive remedy;

(ii) *Fund-balancing:* For Fund-financed responses only, the need for protection of public health and welfare and the environment at the facility under consideration for all of the alternatives that attain or exceed applicable or relevant and appropriate Federal requirements is outweighed by the need for action at other sites that may present a threat to public health or welfare or the environment, considering the amount of money available in the Fund. In the event of Fund-balancing, the lead agency shall select the alternative which most closely approaches the level of protection provided by applicable or relevant and appropriate Federal requirements, considering the specific Fund-balanced sum of money available for the facility under consideration. Fund-balancing is not a consideration in determining the appropriate extent of remedy when the response will be performed or funded by a responsible party;

(iii) *Technical impracticality:* Where no alternative that attains or exceeds applicable or relevant and appropriate Federal public health and environmental requirements is technically practical to implement at the specific site in question from an engineering perspective, the lead agency shall select the alternative that is reasonable to implement from an engineering perspective and that most closely approaches the level of protection provided by applicable or relevant and appropriate Federal public health and environmental requirements.

(iv) *Unacceptable environmental impacts:* Where all the alternatives that attain or exceed applicable or relevant Federal

public health and appropriate environmental requirements will result in significant adverse environmental impacts if implemented, the lead agency shall select the alternative that most closely approaches the level of protection provided by applicable or relevant and appropriate Federal public health and environmental requirements, without resulting in significant adverse environmental impacts.

(v) Where the remedy is to be carried out pursuant to Federal action under CERCLA section 106, the Fund is unavailable, there is a strong public interest in expedited cleanup, and the litigation probably would not result in the desired remedy, the lead agency shall select the alternative that most closely approaches the level of protection provided by applicable or relevant and appropriate Federal public health and environmental requirements in light of the strong public interest in expedited cleanup.

(6)(i) If a factor under §300.68(i)(5) is used in eliminating an alternative or in scaling down the extent of remedy, it must be explained and documented in the appropriate decision document.

(ii) Other Federal criteria, advisories, and guidance and State standards will be considered and may be used by the lead agency in developing remedial alternatives. If the lead agency does not use or uses and adjusts any other standards, the decision documents must explain and document the reasons. The rationale for not using such other standards may include one or more of the circumstances enumerated in §300.68(i)(5).

(j) *Appropriate actions.* The following remedial actions are, as a general rule, appropriate in the following situations; however, this list does not limit the lead agency from selecting any other actions deemed necessary in response to any situation:

(1) In response to contaminated ground water – elimination or containment of the contamination to prevent further contamination, treatment and/or removal of such ground water to reduce or eliminate the contamination, physical containment of such ground water to reduce or eliminate potential exposure to such contamination, and/or restrictions on use of the ground water to eliminate potential exposure to the contamination;

(2) In response to contaminated surface water – elimination or containment of the contamination to prevent further pollution, and/or treatment of the contaminated water to reduce or eliminate its hazard potential;

(3) In response to contaminated soil or waste – actions to remove, treat, or contain the soil or waste to reduce or eliminate the potential for hazardous substances or pollutants or contaminants to contaminate other media (ground water, surface water, or air) and to reduce or eliminate the potential for such substances to be inhaled, absorbed, or ingested;

(4) In response to the threat of direct contact with hazardous substances or pollutants or contaminants – any of the actions listed in §300.65(c) to reduce the likelihood of such contact or the severity of any effects from such contact.

(k) *Remedial site sampling.* (1) Sampling performed pursuant to Fund-financed remedial action must have a written quality assurance/site sampling plan. Sampling performed pursuant to the written quality assurance/site sampling plan will generally be adequate if the plan includes the following elements:

(i) A description of the objectives of the sampling efforts with regard to both the phase of the sampling and the ultimate use of the data;

(ii) Sufficient specification of sampling protocol and procedures:

(iii) Sufficient sampling to adequately characterize the source of the release, likely transport pathways, and/or potential receptor exposure;

(iv) Specifications of the types, locations, and frequency of samples taken, taking into account the unique properties of the site, including the appropriate hydrological, geological, hydrogeological, physiographical, and meteorological properties of the site; and

(v) Such other elements as may be required by the RPM and the appropriate EPA Regional or Headquarters quality assurance office on a site-by-site basis.

(2) In Fund-financed actions or actions under CERCLA section 106, the quality assurance/site sampling plan must be

reviewed and approved by the Remedial Project Manager with a coordination signature from the Qualify [sic] Assurance Officer.

(1) *Response actions pursuant to sections 106 and 111(a)(2) of CERCLA/consistency with NCP.* When a person other than the lead agency takes the response action, the lead agency shall evaluate and approve the adequacy of proposals submitted when the response action: is taken pursuant to section 106 of CERCLA: or involves preauthorization pursuant to section 111(a)(2) of CERCLA or §300.25 of this Plan. When evaluating these proposed response actions and for the purpose of determining consistency with this Plan for cost recovery under section 107 of CERCLA, the remedial investigation or its equivalent must address the factors outlined in paragraph (e) of this section. The full range of alternatives outlined in paragraph (f) of this section must be developed unless a specific, more limited range of alternatives has been negotiated with the lead agency pursuant to action under section 106 of CERCLA or preauthorization.

40 C.F.R. §300.71 (1988) Other party responses.

(a)(1) Any person may undertake a response action to reduce or eliminate the release or threat of release of hazardous substances, or pollutants or contaminants. Section 107 of CERCLA authorizes persons to recover certain response costs consistent with this Plan from responsible parties.

(2) For purposes of cost recovery under section 107 of CERCLA, except for actions taken pursuant to section 106 of CERCLA or pursuant to preauthorization under §300.25 of this Plan, a response action will be consistent with the NCP (or for a State or Federal government response, not inconsistent with the NCP), if the person taking the response action;

(i) Where the action is a removal action, acts in circumstances warranting removal and implements removal action consistent with §300.65,

(ii) Where the action is a remedial action:

(A) Provides for appropriate site investigation and analysis of remedial alternatives as required under §300.68;

(B) Complies with the provisions of paragraphs (e) through (f) of §300.68;

(C) Selects a cost effective response; and

(D) Provides an opportunity for appropriate public comment concerning the selection of a remedial action consistent with paragraph (d) of §300.67 unless compliance with the legally applicable or relevant and appropriate State and local requirements identified under paragraph (a)(4) of this section provides a substantially equivalent opportunity for public involvement in the choice of remedy.

(3) For the purpose of consistency with §§300.65 and 300.68 of this Plan, except for response actions taken pursuant to section 106 of CERCLA or response actions for which reimbursement from the Fund will be sought, any action to be taken by the "lead agency" in §300.65 or §300.68 may be taken by the person carrying out the response.

(4) Persons performing response actions that are neither Fund-financed nor pursuant to action under section 106 of CERCLA shall comply with all otherwise legally applicable or relevant and appropriate Federal, State, and local requirements, including permit requirements.

(b) *Organizations.* Pursuant to CERCLA section 105(9), organizations may assist or conduct site response by:

(1) Organizing responsible parties;

(2) Initiating negotiations or other cooperative efforts;

(3) Apportioning costs among liable parties;

(4) Recommending appropriate settlements to the lead agency;

(5) Conducting the RI/FS in accordance with this Plan;

(6) Evaluating and recommending appropriate remedies to the lead agency;

(7) Implementing and overseeing response actions;

(8) Obtaining assurances for continued site maintenance from responsible parties; and/or

(9) Recommending sites for deletion after completion of all appropriate response action.

(c) *Certification.* Organizations may be certified to conduct site response actions. Certification is not necessary for, but may facilitate, Fund preauthorization under §300.25(d) and lead agency evaluation of the adequacy of proposed response actions.

(1) An organization may request certification by submitting a written request to the Administrator or his designee establishing that the requesting organization has engineering, scientific, or other technical expertise necessary to assist or conduct site response by carrying out any or all of the functions listed in paragraph (b) of this section.

(2) For each specific release being addressed, the certified organization must:

(i) Meet the requirements of §300.25(d) and 40 CFR Part 307 if requesting preauthorization; and

(ii) Have established procedures to recuse members of the organization that may have a conflict of interest with a party potentially responsible for the release.

(3) The Administrator will respond to a request for certification within 180 days of receipt of the request. The Administrator may grant certification, request further information relating to the requested certification, or deny certification.

(4) Certification is effective for two years from the date of latest certification. If certification is not renewed at that time, it automatically expires.

(5) Certification is not to be construed as approval by the lead agency of response actions undertaken by that organization. Certification does not authorize that organization to act on behalf of, or as an agent for, the lead agency.

(6) Certification may be revoked at the discretion of the Administrator for failure to comply with this Plan or the requirements of CERCLA.

(d) *Releases from liability.* Implementation of response measures by responsible parties, certified organizations, or other persons does not release those parties from liability.

Relevant Provisions of the 1990 National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP)

40 C.F.R. §300.150 (1990) Worker health and safety.

(a) Response actions under the NCP will comply with the provisions for response action worker safety and health in 29 CFR 1910.120.

(b) In a response action taken by a responsible party, the responsible party must assure that an occupational safety and health program consistent with 29 CFR 1910.120 is made available for the protection of workers at the response site.

(c) In a response taken under the NCP by a lead agency, an occupational safety and health program should be made available for the protection of workers at the response site, consistent with, and to the extent required by, 29 CFR 1910.120. Contracts relating to a response action under the NCP should contain assurances that the contractor at the response site will comply with this program and with any applicable provisions of the OSH Act and state OSH laws.

(d) When a state, or political subdivision of a state, without an OSHA-approved state plan is the lead agency for response, the state or political subdivision must comply with standards in 40 CFR part 311, promulgated by EPA pursuant to section 126(f) of SARA.

(e) Requirements, standards, and regulations of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) (OSH Act) and of state laws with plans approved under section 18 of the OSH Act (state OSH laws), not directly referenced in paragraphs (a) through (d) of this section, must be complied with where applicable. Federal OSH Act requirements include, among other things, Construction Standards (29 CFR part 1926), General Industry Standards (29 CFR part 1910), and the general duty requirement of section 5(a)(1) of the OSH Act (29 U.S.C. 654(a)(1)). No action by the lead agency with respect to response activities under the NCP constitutes an exercise of statutory authority within the meaning of section 4(b)(1) of the OSH Act. All governmental agencies and private employers are directly responsible for the health and safety of their own employees.

40 C.F.R. §300.155 (1990) Public information and community relations.

(a) When an incident occurs, it is imperative to give the public prompt, accurate information on the nature of the incident and the actions underway to mitigate the damage. OSCs/RPMs and community relations personnel should ensure that all appropriate public and private interests are kept informed and that their concerns are considered throughout a response. They should coordinate with available public affairs/community relations resources to carry out this responsibility.

(b) An on-scene news office may be established to coordinate media relations and to issue official federal information on an incident. Whenever possible, it will be headed by a representative of the lead agency. The OSC/RPM determines the location of the on-scene news office, but every effort should be made to locate it near the scene of the incident. If a participating agency believes public interest warrants the issuance of statements and an on-scene news office has not been established, the affected agency should recommend its establishment. All federal news releases or statements by participating agencies should be cleared through the OSC/RPM.

(c) The community relations requirements specified in §§300.415, 300.430, and 300.435 apply to removal, remedial, and enforcement actions and are intended to promote active communications between communities affected by discharges or releases and the lead agency responsible for response actions. Community Relations Plans (CRPs) are required by EPA for certain response actions. the OSC/RPM should ensure coordination with such plans which may be in effect at the scene of a discharge or release or which may need to be developed during follow-up activities.

40 C.F.R. §300.160 (1990) Documentation and cost recovery.

(a) For releases of a hazardous substance, pollutant, or contaminant, the following provisions apply:

(1) During all phases of response, the lead agency shall complete and maintain documentation to support all actions

taken under the NCP and to form the basis for cost recovery. In general, documentation shall be sufficient to provide the source and circumstances of the release, the identity of responsible parties, the response action taken, accurate accounting of federal, state, or private party costs incurred for response actions, and impacts and potential impacts to the public health and welfare and the environment. Where applicable, documentation shall state when the NRC received notification of a release of a reportable quantity.

(2) The information and reports obtained by the lead agency for Fund-financed response actions shall, as appropriate, be transmitted to the chair of the RRT. Copies can then be forwarded to the NRT, members of the RRT, and others as appropriate. In addition, OSCs shall submit reports as required under §300.165.

(3) The lead agency shall make available to the trustees of affected natural resources information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries.

(b) For discharges of oil, documentation and cost recovery provisions are described in §300.315.

(c) Response actions undertaken by the participating agencies shall be carried out under existing programs and authorities when available. Federal agencies are to make resources available, expend funds, or participate in response to discharges and releases under their existing authority. Interagency agreements may be signed when necessary to ensure that the federal resources will be available for a timely response to a discharge or release. The ultimate decision as to the appropriateness of expending funds rests with the agency that is held accountable for such expenditures. Further funding provisions for discharges of oil are described in §300.335.

(d) The Administrator of EPA and the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) shall assure that the costs of health assessment or health effect studies conducted under the authority of CERCLA section

104(i) are documented in accordance with standard EPA procedures for cost recovery. Documentation shall include information on the nature of the hazardous substances addressed by the research, information concerning the locations where these substances have been found, and any available information on response actions taken concerning these substances at the location.

Subpart E — Hazardous Substance Response

40 C.F.R. §300.400 (1990) General.

* * *

(c) *Fund-financed action.* In determining the need for and in planning or undertaking Fund-financed action, the lead agency shall, to the extent practicable:

(1) Engage in prompt response;

(2) Provide for state participation in response actions, as described in subpart F of this part;

(3) Conserve Fund monies by encouraging private party response;

(4) Be sensitive to local community concerns;

(5) Consider using treatment technologies;

(6) Involve the Regional Response Team (RRT) in both removal and remedial response actions at appropriate decision-making stages;

(7) Encourage the involvement and sharing of technology by industry and other experts; and

(8) Encourage the involvement of organizations to coordinate responsible party actions, foster site response, and provide technical advice to the public, federal and state governments, and industry.

* * *

(e) *Permit requirements.* (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term "on-site" means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

(2) Permits, if required, shall be obtained for all response activities conducted offsite.

* * *

(g) *Identification of applicable or relevant and appropriate requirements.* (1) The lead and support agencies shall identify requirements applicable to the release or remedial action contemplated based upon an objective determination of whether the requirement specifically addresses a hazardous substance, pollutant, contamination, remedial action, location, or other circumstances found at a CERCLA site.

(2) If, based upon paragraph (g)(1) of this section, it is determined that a requirement is not applicable to a specific release, the requirement may still be relevant and appropriate to the circumstances of the release. In evaluating relevance and appropriateness, the factors in paragraphs (g)(2)(i) through (viii) of this section shall be examined, where pertinent, to determine whether a requirement addresses problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and whether the requirement is well-suited to the site, and therefore is both relevant and appropriate. The pertinence of each of the following factors will depend, in part, on whether a requirement addresses a chemical, location, or action. The following comparisons shall be made, where pertinent, to determine relevance and appropriateness:

(i) The purpose of the requirement and the purpose of the CERCLA action;

(ii) The medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site;

(iii) The substances regulated by the requirement and the substances found at the CERCLA site;

(iv) The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site;

(v) Any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site;

(vi) The type of place regulated and the type of place affected by the release or CERCLA action;

(vii) The type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action;

(viii) Any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site.

(3) In addition to applicable or relevant and appropriate requirements, the lead and support agencies may, as appropriate, identify other advisories, criteria, or guidance to be considered for a particular release. The "to be considered" (TBC) category consists of advisories, criteria, or guidance that were developed by EPA, other federal agencies, or states that may be useful in developing CERCLA remedies.

(4) Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate. For purposes of identification and notification of promulgated state standards, the term "promulgated" means that the standards are of general applicability and are legally enforceable.

(5) The lead agency and support agency shall identify their specific requirements that are applicable or relevant and appropriate for a particular site. These agencies shall notify each other, in a timely manner as described in §300.515(d), of the requirements they have determined to be applicable or relevant and appropriate. When identifying a requirement as an ARAR, the lead agency and support agency shall include a citation to the statute or regulation from which the requirement is derived.

(6) Notification of ARARs shall be according to procedures and timeframes specified in §300.515(d)(2) and (h)(2).

* * *

40 C.F.R. §300.405 (1990) Discovery or notification.

* * *

(b) Any person in charge of a vessel or a facility shall report releases as described in paragraph (a)(1) of this section to the National Response Center (NRC). If direct reporting to the NRC

is not practicable, reports may be made to the United States Coast Guard (USCG) on-scene coordinator (OSC) for the geographic area where the release occurs. The EPA predesignated OSC may also be contacted through the regional 24-hour emergency response telephone number. All such reports shall be promptly relayed to the NRC. If it is not possible to notify NRC or predesignated OSC immediately, reports may be made immediately to the nearest USCG unit. In any event, such person in charge of the vessel or facility shall notify the NRC as soon as possible.

(c) All other reports of releases described under paragraph (a) of this section, except releases reported under paragraphs (a) (2) and (6) of this section, shall, as appropriate, be made to the NRC.

(d) The NRC will generally need information that will help to characterize the release. This will include, but not be limited to: Location of the release; type(s) of material(s) released; an estimate of the quantity of material released; possible source of the release; and date and time of the release. Reporting under paragraphs (b) and (c) of this section shall not be delayed due to incomplete notification information.

* * *

40 C.F.R §300.410 (1990) Removal site evaluation.

(a) A removal site evaluation includes a removal preliminary assessment and, if warranted, a removal site inspection.

(b) A removal site evaluation of a release identified for possible CERCLA response pursuant to §300.415 shall, as appropriate, be undertaken by the lead agency as promptly as possible. The lead agency may perform a removal preliminary assessment in response to petitions submitted by a person who is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant pursuant to §300.420(b)(5).

(c)(1) The lead agency shall, as appropriate, base the removal preliminary assessment on readily available information. A removal preliminary assessment may include, but is not limited to:

(i) Identification of the source and nature of the release or threat of release;

(ii) Evaluation by ATSDR or by other sources, for example, state public health agencies, of the threat to public health;

(iii) Evaluation of the magnitude of the threat;

(iv) Evaluation of factors necessary to make the determination of whether a removal is necessary; and

(v) Determination of whether a nonfederal party is undertaking proper response.

(2) A removal preliminary assessment of releases from hazardous waste management facilities may include collection or review of data such as site management practices, information from generators, photographs, analysis of historical photographs, literature searches, and personal interviews conducted, as appropriate.

(d) A removal site inspection may be performed if more information is needed. Such inspection may include a perimeter (i.e., off-site) or on-site inspection, taking into consideration whether such inspection can be performed safely.

(e) A removal site evaluation shall be terminated when the OSC or lead agency determines:

(1) There is no release;

(2) The source is neither a vessel nor a facility as defined in §300.5 of the NCP;

(3) The release involves neither a hazardous substance, nor a pollutant or contaminant that may present an imminent and substantial danger to public health or welfare;

(4) The release consists of a situation specified in §300.400(b)(1) through (3) subject to limitations on response;

(5) The amount, quantity, or concentration released does not warrant federal response;

(6) A party responsible for the release, or any other person, is providing appropriate response, and on-scene monitoring by the government is not required; or

(7) The removal site evaluation is completed.

(f) The results of the removal site evaluation shall be documented.

(g) If natural resources are or may be injured by the release, the OSC or lead agency shall ensure that state and federal trustees of the affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The OSC or lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

(h) If the removal site evaluation indicates that removal action under §300.415 is not required, but that remedial action under §300.430 may be necessary, the lead agency shall, as appropriate, initiate a remedial site evaluation pursuant to §300.420.

40 C.F.R. §300.415 (1990) Removal action.

(a)(1) In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, if any has been done previously, and the current site conditions, to determine if removal action is appropriate.

(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly.

(3) This section does not apply to removal actions taken pursuant to section 104(b) of CERCLA. The criteria for such actions are set forth in section 104(b) of CERCLA.

(b)(1) At any release, regardless of whether the site is included on the National Priorities List, where the lead agency makes the determination, based on the factors in paragraph (b)(2) of this section, that there is a threat to public health or welfare or the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.

(2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this section:

(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;

(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and

(viii) Other situations or factors that may pose threats to public health or welfare or the environment.

(3) If the lead agency determines that a removal action is appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare or the environment. The lead agency shall, at the earliest possible time, also make any necessary determinations pursuant to paragraph (b)(4) of this section.

(4) Whenever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines, based on a site evaluation, that a removal action is appropriate:

(i) The lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site.

(ii) If environmental samples are to be collected, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:

(A) The field sampling plan, which describes the number, type, and location of samples and the type of analyses; and

(B) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in planning and documenting the removal action.

(5) Fund-financed removal actions, other than those authorized under section 104(b) of CERCLA, shall be terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site, unless the lead agency determines that:

(i) There is an immediate risk to public health or welfare or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or

(ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

(c) Removal actions shall, to the extent practicable, contribute to the efficient performance of any anticipated long-term remedial action with respect to the release concerned.

(d) The following removal actions are, as a general rule, appropriate in the types of situations shown; however, this list is not exhaustive and is not intended to prevent the lead agency from taking any other actions deemed necessary under CERCLA or other appropriate federal or state enforcement or response authorities, and the list does not create a duty on the lead agency to take action at any particular time:

(1) Fences, warning signs, or other security or site control precautions — where humans or animals have access to the release;

(2) Drainage controls, for example, run-off or run-on diversion — where needed to reduce migration of hazardous substances or pollutants or contaminants off-site or to prevent precipitation or run-off from other sources, for example, flooding, from entering the release area from other areas;

(3) Stabilization of berms, dikes, or impoundments or drainage or closing of lagoons — where needed to maintain the integrity of the structures;

(4) Capping of contaminated soils or sludge – where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground or surface water, or air;

(5) Using chemicals and other materials to retard the spread of the release or to mitigate its effects – where the use of such chemicals will reduce the spread of the release;

(6) Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas – where such actions will reduce the spread of, or direct contact with, the contamination;

(7) Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants – where it will reduce the likelihood of spillage; leakage; exposure to humans, animals, or food chain; or fire or explosion;

(8) Containment, treatment, disposal, or incineration of hazardous material – where needed to reduce the likelihood of human, animal, or food chain exposure; or

(9) Provision of alternative water supply – where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

(e) Where necessary to protect public health or welfare, the lead agency shall request that FEMA conduct a temporary relocation or that state/local officials conduct an evacuation.

(f) If the lead agency determines that the removal action will not fully address the threat posed by the release and the release may require remedial action, the lead agency shall ensure an orderly transition from removal to remedial response activities.

(g) Removal actions conducted by states under cooperative agreements, described in subpart F of this part, shall comply with all requirements of this section.

(h) Facilities operated by a state or political subdivision at the time of disposal require a state cost share of at least 50 percent of Fund-financed response costs if a Fund-financed remedial action is conducted.

(i) Fund-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall,

to the extent practicable considering the exigencies of the situation, attain applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws. Waivers described in §300.430(f)(1)(ii)(C) may be used for removal actions. Other federal and state advisories, criteria, or guidance may, as appropriate, be considered in formulating the removal action (see §300.400 (g)(3)). In determining whether compliance with ARARs is practicable, the lead agency may consider appropriate factors, including:

(1) The urgency of the situation; and

(2) The scope of the removal action to be conducted.

(j) Removal actions pursuant to section 106 or 122 of CERCLA are not subject to the following requirements of this section:

(1) Section 300.415 (a)(2) requirement to locate responsible parties and have them undertake the response;

(2) Section 300.415(b)(2)(vii) requirement to consider the availability of other appropriate federal or state response and enforcement mechanisms to respond to the release;

(3) Section 300.415(b)(5) requirement to terminate response after $2 million has been obligated or 12 months have elapsed from the date of the initial response; and

(4) Section 300.415(f) requirement to assure an orderly transition from removal to remedial action.

(k) To the extent practicable, provision for post-removal site control following a Fund-financed removal action at both NPL and non-NPL sites is encouraged to be made prior to the initiation of the removal action. Such post-removal site control includes actions necessary to ensure the effectiveness and integrity of the removal action after the completion of the on-site removal action or after the $2 million or 12-month statutory limits are reached for sites that do not meet the exemption criteria in paragraph (b)(5) of this section. Post-removal site control may be conducted by:

(1) The affected state or political subdivision thereof or local units of government for any removal;

(2) Potentially responsible parties; or

(3) EPA's remedial program for some federal-lead Fund-financed responses at NPL sites.

(l) OSCs/RPMs conducting removal actions shall submit OSC reports to the RRT as required by §300.165.

(m) *Community relations in removal actions.* (1) In the case of all removal actions taken pursuant to §300.415 or CERCLA enforcement actions to compel removal response, a spokesperson shall be designated by the lead agency. The spokesperson shall inform the community of actions taken, respond to inquiries, and provide information concerning the release. All news releases or statements made by participating agencies shall be coordinated with the OSC/RPM. The spokesperson shall notify, at a minimum, immediately affected citizens, state and local officials, and, when appropriate, civil defense or emergency management agencies.

(2) For actions where, based on the site evaluation, the lead agency determines that a removal is appropriate, and that less than six months exists before on-site removal activity must begin, the lead agency shall:

(i) Publish a notice of availability of the administrative record file established pursuant to §300.820 in a major local newspaper of general circulation within 60 days of initiation of on-site removal activity;

(ii) Provide a public comment period, as appropriate, of not less than 30 days from the time the administrative record file is made available for public inspection, pursuant to §300.820(b)(2); and

(iii) Prepare a written response to significant comments pursuant to §300.820(b)(3).

(3) For removal actions where on-site action is expected to extend beyond 120 days from the initiation of on-site removal activities, the lead agency shall by the end of the 120-day period:

(i) Conduct interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns, information needs, and how or when citizens would like to be involved in the Superfund process;

(ii) Prepare a formal community relations plan (CRP) based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the response; and

(iii) Establish at least one local information repository at or near the location of the response action. The information repository should contain items made available for public information. Further, an administrative record file established pursuant to subpart I for all removal actions shall be available for public inspection in at least one of the repositories. The lead agency shall inform the public of the establishment of the information repository and provide notice of availability of the administrative record file for public review. All items in the repository shall be available for public inspection and copying.

(4) Where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that a planning period of at least six months exists prior to initiation of the on-site removal activities, the lead agency shall at a minimum:

(i) Comply with the requirements set forth in paragraphs (m)(3)(i), (ii) and (iii) of this section, prior to the completion of the engineering evaluation/cost analysis (EE/CA), or its equivalent, except that the information repository and the administrative record fill will be established no later than when the EE/CA approval memorandum is signed;

(ii) Publish a notice of availability and brief description of the EE/CA in a major local newspaper of general circulation pursuant to §300.820;

(iii) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments after completion of the EE/CA pursuant to §300.820(a). Upon timely request, the lead agency will extend the public comment period by a minimum of 15 days, and

(iv) Prepare a written response to significant comments pursuant to §300.820(a).

40 C.F.R. §300.420 (1990) Remedial site evaluation.

(a) *General.* The purpose of this section is to describe the methods, procedures, and criteria the lead agency shall use to collect data, as required, and evaluate releases of hazardous substances, pollutants, or contaminants. The evaluation may consist of two steps: a remedial preliminary assessment (PA) and a remedial site inspection (SI).

(b) *Remedial preliminary assessment.* (1) The lead agency shall perform a remedial PA on all sites in CERCLIS as defined in §300.5 to:

(i) Eliminate from further consideration those sites that pose no threat to public health or the environment;

(ii) Determine if there is any potential need for removal action;

(iii) Set priorities for site inspections; and

(iv) Gather existing data to facilitate later evaluation of the release pursuant to the Hazard Ranking System (HRS) if warranted.

(2) A remedial PA shall consist of a review of existing information about a release such as information on the pathways of exposure, exposure targets and source and nature of release. A remedial PA shall also include an off-site reconnaissance as appropriate. A remedial PA may include an on-site reconnaissance where appropriate.

(3) If the remedial PA indicates that a removal action may be warranted, the lead agency shall initiate removal evaluation pursuant to §300.410.

(4) In performing a remedial PA, the lead agency may complete the EPA Preliminary Assessment form, available from EPA regional offices, or its equivalent, and shall prepare a PA report, which shall include:

(i) A description of the release;

(ii) A description of the probable nature of the release; and

(iii) A recommendation on whether further action is warranted, which lead agency should conduct further action, and whether an SI or removal action or both should be undertaken.

(5) Any person may petition the lead federal agency (EPA or the appropriate federal agency in the case of a release or suspected release from a federal facility), to perform a PA of a release when such person is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant. Such petitions shall be addressed to the EPA Regional Administrator for the region in which the release is located, except that petitions for PAs involving federal facilities should be addressed to the head of the appropriate federal agency.

(i) Petitions shall be signed by the petitioner and shall contain the following:

(A) The full name, address, and phone number of petitioner;

(B) A description, as precisely as possible, of the location of the release; and

(C) How the petitioner is or may be affected by the release.

(ii) Petitions should also contain the following information to the extent available:

(A) What type of substances were or may be released;

(B) The nature of activities that have occurred where the release is located; and

(C) whether local and state authorities have been contacted about the release.

(iii) The lead federal agency shall complete a remedial or removal PA within one year of the date of receipt of a complete petition pursuant to paragraph (b)(5) of this section, if one has not been performed previously, unless the lead federal agency determines that a PA is not appropriate. Where such a determination is made, the lead federal agency shall notify the petitioner and will provide a reason for the determination.

(iv) When determining if performance of a PA is appropriate, the lead federal agency shall take into consideration:

(A) Whether there is information indicating that a release has occurred or there is a threat of a release of a hazardous substance, pollutant, or contaminant; and

(B) Whether the release is eligible for response under CERCLA.

(c) *Remedial site inspection.* (1) The lead agency shall perform a remedial SI as appropriate to:

(i) Eliminate from further consideration those releases that pose no significant threat to public health or the environment;

(ii) Determine the potential need for removal action;

(iii) Collect or develop additional data, as appropriate, to evaluate the release pursuant to the HRS; and

(iv) Collect data in addition to that required to score the release pursuant to the HRS, as appropriate, to better characterize the release for more effective and rapid initiation of the RI/FS or response under other authorities.

(2) The remedial SI shall build upon the information collected in the remedial PA. The remedial SI shall involve, as appropriate, both on- and off-site field investigatory efforts, and sampling.

(3) If the remedial SI indicates that removal action may be appropriate, the lead agency shall initiate removal site evaluation pursuant to §300.410.

(4) Prior to conducting field sampling as part of site inspections, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. The sampling and analysis plans shall consist of two parts:

(i) The field sampling plan, which describes the number, type, and location of samples, and the type of analyses, and

(ii) The quality assurance project plan (QAPP), which describes policy, organization, and functional activities, and the data quality objectives and measures necessary to achieve adequate data for use in site evaluation and hazard ranking system activities.

(5) Upon completion of a remedial SI, the lead agency shall prepare a report that includes the following:

(i) A description/history/nature of waste handling;

(ii) A description of known contaminants;

(iii) A description of pathways of migration of contaminants;

(iv) An identification and description of human and environmental targets; and

(v) A recommendation on whether further action is warranted.

40 C.F.R. §300.430 (1990) Remedial investigation/feasibility study and selection of remedy.

(a) *General*—(1) *Introduction.* The purpose of the remedy selection process is to implement remedies that eliminate, reduce, or control risks to human health and the environment. Remedial actions are to be implemented as soon as site data and information make it possible to do so. Accordingly, EPA has established the following program goal, expectations, and program management principles to assist in the identification and implementation of appropriate remedial actions.

(i) *Program goal.* The national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste.

(ii) *Program management principles.* EPA generally shall consider the following general principles of program management during the remedial process:

(A) Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of total site cleanup.

(B) Operable units, including interim action operable units, should not be inconsistent with nor preclude implementation of the expected final remedy.

(C) Site-specific data needs, the evaluation of alternatives, and the documentation of the selected remedy should reflect the scope and complexity of the site problems being addressed.

(iii) *Expectations.* EPA generally shall consider the following expectations in developing appropriate remedial alternatives:

(A) EPA expects to use treatment to address the principal threats posed by a site, wherever practicable. Principal threats for which treatment is most likely to be appropriate include

liquids, areas contaminated with high concentrations of toxic compounds, and highly mobile materials.

(B) EPA expects to use engineering controls, such as containment, for waste that poses a relatively low long-term threat or where treatment is impracticable.

(C) EPA expects to use a combination of methods, as appropriate, to achieve protection of human health and the environment. In appropriate site situations, treatment of the principal threats posed by a site, with priority placed on treating waste that is liquid, highly toxic or highly mobile, will be combined with engineering controls (such as containment) and institutional controls, as appropriate, for treatment residuals and untreated waste.

(D) EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short- and long-term management to prevent or limit exposure to hazardous substances, pollutants, or contaminants. Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and, where necessary, as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy.

(E) EPA expects to consider using innovative technology when such technology offers the potential for comparable or superior treatment performance or implementability, fewer or lesser adverse impacts than other available approaches, or lower costs for similar levels of performance than demonstrated technologies.

(F) EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site. When restoration of ground water to beneficial uses is not practicable, EPA expects to prevent further migration of the plume, prevent

exposure to the contaminated ground water, and evaluate further risk reduction.

(2) *Remedial investigation/feasibility study.* The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered.

(b) *Scoping.* In implementing this section, the lead agency should consider the program goal, program management principles, and expectations contained in this rule. The investigative and analytical studies should be tailored to site circumstances so that the scope and detail of the analysis is appropriate to the complexity of site problems being addressed. During scoping, the lead and support agencies shall confer to identify the optimal set and sequence of actions necessary to address site problems. Specifically, the lead agency shall:

(1) Assemble and evaluate existing data on the site, including the results of any removal actions, remedial preliminary assessment and site inspections, and the NPL listing process.

(2) Develop a conceptual understanding of the site based on the evaluation of existing data described in paragraph (b)(1) of this section.

(3) Indentify likely response scenarios and potentially applicable technologies and operable units that may address site problems.

(4) Undertake limited data collection efforts or studies where this information will assist in scoping the RI/FS or accelerate response actions, and begin to identify the need for treatability studies, as appropriate.

(5) Indentify the type, quality, and quantity of the data that will be collected during the RI/FS to support decisions regarding remedial response activities.

(6) Prepare site-specific health and safety plans that shall specify, at a minimum, employee training and protective equipment, medical surveillance requirements, standard operating procedures, and a contingency plan that conforms with 29 CFR 1910.120 (l)(1) and (l)(2).

(7) If natural resources are or may be injured by the release, ensure that state and federal trustees of the affected natural resources have been notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

(8) Develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:

(i) The field sampling plan, which describes the number, type, and location of samples and the type of analysis; and

(ii) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in selecting the appropriate remedy.

(9) Initiate the identification of potential federal and state ARARs and, as appropriate, other criteria, advisories, or guidance to be considered.

(c) *Community relations.* (1) The community relations requirements described in this section apply to all remedial activities undertaken pursuant to CERCLA section 104 and to section 106 or section 122 consent orders or decrees, or section 106 administrative orders.

(2) The lead agency shall provide for the conduct of the following community relations activities, to the extent practicable, prior to commencing field work for the remedial investigation:

(i) Conducting interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information

needs, and to learn how and when citizens would like to be involved in the Superfund process.

(ii) Preparing a formal community relations plan (CRP), based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the remedial response. The purpose of the CRP is to:

(A) Ensure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy;

(B) Determine, based on community interviews, appropriate activities to ensure such public involvement, and

(C) Provide appropriate opportunities for the community to learn about the site.

(iii) Establishing at least one local information repository at or near the location of the response action. Each information repository should contain a copy of items made available to the public, including information that describes the technical assistance grants application process. The lead agency shall inform interested parties of the establishment of the information repository.

(iv) Informing the community of the availability of technical assistance grants.

(3) For PRP actions, the lead agency shall plan and implement the community relations program at a site. PRPs may participate in aspects of the community relations program at the discretion of and with oversight by the lead agency.

(4) The lead agency may conduct technical discussions involving PRPs and the public. These technical discussions may be held separately from, but contemporaneously with, the negotiations/settlement discussions.

(5) In addition, the following provisions specifically apply to enforcement actions:

(i) Lead agencies entering into an enforcement agreement with de minimis parties under CERCLA section 122(g) or cost recovery settlements under section 122(h) shall publish a notice of the proposed agreement in the Federal Register at least 30

days before the agreement becomes final, as required by section 122(i). The notice must identify the name of the facility and the parties to the proposed agreement and must allow an opportunity for comment and consideration of comments; and

(ii) Where the enforcement agreement is embodied in a consent decree, public notice and opportunity for public comment shall be provided in accordance with 28 CFR 50.7.

(d) *Remedial investigation.* (1) The purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives. To characterize the site, the lead agency shall, as appropriate, conduct field investigations, including treatability studies, and conduct a baseline risk assessment. The RI provides information to assess the risks to human health and the environment and to support the development, evaluation, and selection of appropriate response alternatives. Site characterization may be conducted in one or more phases to focus sampling efforts and increase the efficiency of the investigation. Because estimates of actual or potential exposures and associated impacts on human and environmental receptors may be refined throughout the phases of the RI as new information is obtained, site characterization activities should be fully integrated with the development and evaluation of alternatives in the feasibility study. Bench- or pilot-scale treatability studies shall be conducted, when appropriate and practicable, to provide additional data for the detailed analysis and to support engineering design of remedial alternatives.

(2) The lead agency shall characterize the nature of and threat posed by the hazardous substances and hazardous materials and gather data necessary to assess the extent to which the release poses a threat to human health or the environment or to support the analysis and design of potential response actions by conducting, as appropriate, field investigations to assess the following factors:

(i) Physical characteristics of the site, including important surface features, soils, geology, hydrogeology, meteorology, and ecology;

(ii) Characteristics or classifications of air, surface water, and ground water;

(iii) The general characteristics of the waste, including quantities, state, concentration, toxicity, propensity to bioaccumulate, persistence, and mobility;

(iv) The extent to which the source can be adequately identified and characterized;

(v) Actual and potential exposure pathways through environmental media;

(vi) Actual and potential exposure routes, for example, inhalation and ingestion; and

(vii) Other factors, such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives.

(3) The lead and support agency [sic] shall identify their respective potential ARARs related to the location of and contaminants at the site in a timely manner. The lead and support agencies may also, as appropriate, identify other pertinent advisories, criteria, or guidance in a timely manner (see §300.400(g)(3)).

(4) Using the data developed under paragraphs (d) (1) and (2) of this section, the lead agency shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to ground water or surface water, releasing to air, leaching through soil, remaining in the soil, and bioaccumulating in the food chain. The results of the baseline risk assessment will help establish acceptable exposure levels for use in developing remedial alternatives in the FS, as described in paragraph (e) of this section.

(e) *Feasibility study.* (1) The primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. The lead agency may develop a feasibility study to address a specific site problem or the entire site. The development and evaluation of alternatives shall reflect the scope and

complexity of the remedial action under consideration and the site problems being addressed. Development of alternatives shall be fully integrated with the site characterization activities of the remedial investigation described in paragraph (d) of this section. The lead agency shall include an alternatives screening step, when needed, to select a reasonable number of alternatives for detailed analysis.

(2) Alternatives shall be developed that protect human health and the environment by recycling waste or by eliminating, reducing, and/or controlling risks posed through each pathway by a site. The number and type of alternatives to be analyzed shall be determined at each site, taking into account the scope, characteristics, and complexity of the site problem that is being addressed. In developing and, as appropriate, screening the alternatives, the lead agency shall:

(i) Establish remedial action objectives specifying contaminants and media of concern, potential exposure pathways, and remediation goals. Initially, preliminary remediation goals are developed based on readily available information, such as chemical-specific ARARs or other reliable information. Preliminary remediation goals should be modified, as necessary, as more information becomes available during the RI/FS. Final remediation goals will be determined when the remedy is selected. Remediation goals shall establish acceptable exposure levels that are protective of human health and the environment and shall be developed by considering the following:

(A) Applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws, if available, and the following factors:

(*1*) For systemic toxicants, acceptable exposure levels shall represent concentration levels to which the human population, including sensitive subgroups, may be exposed without adverse effect during a lifetime or part of a lifetime, incorporating an adequate margin of safety;

(2) For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{-4} and 10^{-6} using information on the relationship

between dose and response. The 10^{-6} risk level shall be used as the point of departure for determining remediation goals for alternatives when ARARs are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure;

(3) Factors related to technical limitations such as detection/quantification limits for contaminants;

(4) Factors related to uncertainty; and

(5) Other pertinent information.

(B) Maximum contaminant level goals (MCLGs), established under the Safe Drinking Water Act, that are set at levels above zero, shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCLGs are relevant and appropriate under the circumstances of the release based on the factors in §300.400(g)(2). If an MCLG is determined not to be relevant and appropriate, the corresponding maximum contaminant level (MCL) shall be attained where relevant and appropriate to the circumstances of the release.

(C) Where the MCLG for a contaminant has been set at a level of zero, the MCL promulgated for that contaminant under the Safe Drinking Water Act shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCL is relevant and appropriate under the circumstances of the release based on the factors in §300.400(g)(2).

(D) In cases involving multiple contaminants or pathways where attainment of chemical-specific ARARs will result in cumulative risk in excess of 10^{-4}, criteria in paragraph (e)(2)(i)(A) of this section may also be considered when determining the cleanup level to be attained.

(E) Water quality criteria established under sections 303 or 304 of the Clean Water Act shall be attained where relevant and appropriate under the circumstances of the release.

(F) An alternate concentration limit (ACL) may be established in accordance with CERCLA section 121(d)(2)(B)(ii).

(G) Environmental evaluations shall be performed to assess threats to the environment, especially sensitive habitats and critical habitats of species protected under the Endangered Species Act.

(ii) Identify and evaluate potentially suitable technologies, including innovative technologies;

(iii) Assemble suitable technologies into alternative remedial actions.

(3) For source control actions, the lead agency shall develop, as appropriate:

(i) A range of alternatives in which treatment that reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or contaminants is a principal element. As appropriate, this range shall include an alternative that removes or destroys hazardous substances, pollutants, or contaminants to the maximum extent feasible, eliminating or minimizing, to the degree possible, the need for long-term management. The lead agency also shall develop, as appropriate, other alternatives which, at a minimum, treat the principal threats posed by the site but vary in the degree of treatment employed and the quantities and characteristics of the treatment residuals and untreated waste that must be managed; and

(ii) One or more alternatives that involve little or no treatment, but provide protection of human health and the environment primarily by preventing or controlling exposure to hazardous substances, pollutants, or contaminants, through engineering controls, for example, containment, and, as necessary, institutional controls to protect human health and the environment and to assure continued effectiveness of the response action.

(4) For ground-water response actions, the lead agency shall develop a limited number of remedial alternatives that attain site-specific remediation levels within different restoration time periods utilizing one or more different technologies.

(5) The lead agency shall develop one or more innovative treatment technologies for further consideration if those technologies offer the potential for comparable or superior performance or implementability; fewer or lesser adverse impacts than

other available approaches; or lower costs for similar levels of performance than demonstrated treatment technologies.

(6) The no-action alternative, which may be no further action if some removal or remedial action has already occurred at the site, shall be developed.

(7) As appropriate, and to the extent sufficient information is available, the short- and long-term aspects of the following three criteria shall be used to guide the development and screening of remedial alternatives:

(i) *Effectiveness.* This criterion focuses on the degree to which an alternative reduces toxicity, mobility, or volume through treatment, minimizes residual risks and affords long-term protection, complies with ARARs, minimizes short-term impacts, and how quickly it achieves protection. Alternatives providing significantly less effectiveness than other, more promising alternatives may be eliminated. Alternatives that do not provide adequate protection of human health and the environment shall be eliminated from further consideration.

(ii) *Implementability.* This criterion focuses on the technical feasibility and availability of the technologies each alternative would employ and the administrative feasibility of implementing the alternative. Alternatives that are technically or administratively infeasible or that would require equipment, specialists, or facilities that are not available within a reasonable period of time may be eliminated from further consideration.

(iii) *Cost.* The costs of construction and any long-term costs to operate and maintain the alternatives shall be considered. Costs that are grossly excessive compared to the overall effectiveness of alternatives may be considered as one of several factors used to eliminate alternatives. Alternatives providing effectiveness and implementability similar to that of another alternative by employing a similar method of treatment or engineering control, but at greater cost, may be eliminated.

(8) The lead agency shall notify the support agency of the alternatives that will be evaluated in detail to facilitate the identification of ARARs and, as appropriate, pertinent advisories, criteria, or guidance to be considered.

(9) *Detailed analysis of alternatives.* (i) A detailed analysis shall be conducted on the limited number of alternatives that represent viable approaches to remedial action after evaluation in the screening stage. The lead and support agencies must identify their ARARs related to specific actions in a timely manner and no later than the early stages of the comparative analysis. The lead and support agencies may also, as appropriate, identify other pertinent advisories, criteria, or guidance in a timely manner.

(ii) The detailed analysis consists of an assessment of individual alternatives against each of nine evaluation criteria and a comparative analysis that focuses upon the relative performance of each alternative against those criteria.

(iii) *Nine criteria for evaluation.* The analysis of alternatives under review shall reflect the scope and complexity of site problems and alternatives being evaluated and consider the relative significance of the factors within each criteria. The nine evaluation criteria are as follows:

(A) *Overall protection of human health and the environment.* Alternatives shall be assessed to determine whether they can adequately protect human health and the environment, in both the short- and long-term, from unacceptable risks posed by hazardous substances, pollutants, or contaminants present at the site by eliminating, reducing, or controlling exposures to levels established during development of remediation goals consistent with §300.430(e)(2)(i). Overall protection of human health and the environment draws on the assessments of other evaluation criteria, especially long-term effectiveness and permanence, short-term effectiveness, and compliance with ARARs.

(B) *Compliance with ARARs.* The alternatives shall be assessed to determine whether they attain applicable or relevant and appropriate requirements under federal environmental laws and state environmental or facility siting laws or provide grounds for invoking one of the waivers under paragraph (f)(1)(ii)(C) of this section.

(C) *Long-term effectiveness and permanence.* Alternatives shall be assessed for the long-term effectiveness and permanence they afford, along with the degree of certainty that the

alternative will prove successful. Factors that shall be considered, as appropriate, include the following:

(*1*) Magnitude of residual risk remaining from untreated waste or treatment residuals remaining at the conclusion of the remedial activities. The characteristics of the residuals should be considered to the degree that they remain hazardous, taking into account their volume, toxicity, mobility, and propensity to bioaccumulate.

(*2*) Adequacy and reliability of controls such as containment systems and institutional controls that are necessary to manage treatment residuals and untreated waste. This factor addresses in particular the uncertainties associated with land disposal for providing long-term protection from residuals; the assessment of the potential need to replace technical components of the alternative, such as a cap, a slurry wall, or a treatment system; and the potential exposure pathways and risks posed should the remedial action need replacement.

(D) *Reduction of toxicity, mobility, or volume through treatment.* The degree to which alternatives employ recycling or treatment that reduces toxicity, mobility, or volume shall be assessed, including how treatment is used to address the principal threats posed by the site. Factors that shall be considered, as appropriate, include the following:

(*1*) The treatment or recycling processes the alternatives employ and materials they will treat;

(*2*) The amount of hazardous substances, pollutants, or contaminants that will be destroyed, treated, or recycled;

(*3*) The degree of expected reduction in toxicity, mobility, or volume of the waste due to treatment or recycling and the specification of which reduction(s) are occurring;

(*4*) The degree to which the treatment is irreversible;

(*5*) The type and quantity of residuals that will remain following treatment, considering the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents; and

(*6*) The degree to which treatment reduces the inherent hazards posed by principal threats at the site.

(E) *Short-term effectiveness.* The short-term impacts of alternatives shall be assessed considering the following:

(*1*) Short-term risks that might be posed to the community during implementation of an alternative;

(*2*) Potential impacts on workers during remedial action and the effectiveness and reliability of protective measures;

(*3*) Potential environmental impacts of the remedial action and the effectiveness and reliability of mitigative measures during implementation; and

(*4*) Time until protection is achieved.

(F) *Implementability.* The ease or difficulty of implementing the alternatives shall be assessed by considering the following types of factors as appropriate;

(*1*) Technical feasibility, including technical difficulties and unknowns associated with the construction and operation of a technology, the reliability of the technology, ease of undertaking additional remedial actions, and the ability to monitor the effectiveness of the remedy.

(2) Administrative feasibility, including activities needed to coordinate with other offices and agencies and the ability and time required to obtain any necessary approvals and permits from other agencies (for off-site actions);

(*3*) Availability of services and materials, including the availability of adequate off-site treatment, storage capacity, and disposal capacity and services; the availability of necessary equipment and specialists, and provisions to ensure any necessary additional resources; the availability of services and materials; and availability of prospective technologies.

(G) *Cost.* The types of costs that shall be assessed include the following:

(*1*) Capital costs, including both direct and indirect costs;

(*2*) Annual operation and maintenance costs; and

(*3*) Net present value of capital and O&M costs.

(H) *State acceptance.* Assessment of state concerns may not be completed until comments on the RI/FS are received but may be discussed, to the extent possible, in the proposed plan issued for public comment. The state concerns that shall be assessed include the following:

(*1*) The state's position and key concerns related to the preferred alternative and other alternatives; and

(*2*) State comments on ARARs or the proposed use of waivers.

(I) *Community acceptance.* This assessment includes determining which components of the alternatives interested persons in the community support, have reservations about, or oppose. This assessment may not be completed until comments on the proposed plan are received.

(f) *Selection of remedy*—(1) Remedies selected shall reflect the scope and purpose of the actions being undertaken and how the action relates to long-term, comprehensive response at the site.

(i) The criteria noted in paragraph (e)(9)(iii) of this section are used to select a remedy. These criteria are categorized into three groups.

(A) *Threshold criteria.* Overall protection of human health and the environment and compliance with ARARs (unless a specific ARAR is waived) are threshold requirements that each alternative must meet in order to be eligible for selection.

(B) *Primary balancing criteria.* The five primary balancing criteria are long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost.

(C) *Modifying criteria.* State and community acceptance are modifying criteria that shall be considered in remedy selection.

(ii) The selection of a remedial action is a two-step process and shall proceed in accordance with §300.515(e). First, the lead agency, in conjunction with the support agency, identifies a preferred alternative and presents it to the public in a proposed plan, for review and comment. Second, the lead agency shall review the public comments and consult with the state (or support agency) in order to determine if the alternative remains the most appropriate remedial action for the site or site problem. The lead agency, as specified in §300.515(e), makes the final remedy selection decision, which shall be documented in the ROD. Each remedial alternative selected as a Superfund

remedy will employ the criteria as indicated in paragraph (f)(1)(i) of this section to make the following determination;

(A) Each remedial action selected shall be protective of human health and the environment.

(B) On-site remedial actions selected in a ROD must attain those ARARs that are identified at the time of ROD signature or provide grounds for invoking a waiver under §300.430(f)(1)(ii)(C).

(*1*) Requirements that are promulgated or modified after ROD signature must be attained (or waived) only when determined to be applicable or relevant and appropriate and necessary to ensure that the remedy is protective of human health and the environment.

(2) Components of the remedy not described in the ROD must attain (or waive) requirements that are identified as applicable or relevant and appropriate at the time the amendment to the ROD or the explanation of significant difference describing the component is signed.

(C) An alternative that does not meet an ARAR under federal environmental or state environmental or facility siting laws may be selected under the following circumstances:

(*1*) The alternative is an interim measure and will become part of a total remedial action that will attain the applicable or relevant and appropriate federal or state requirement;

(2) Compliance with the requirement will result in greater risk to human health and the environment than other alternatives;

(3) Compliance with the requirement is technically impracticable from an engineering perspective;

(*4*) The alternative will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation through use of another method or approach;

(5) With respect to a state requirement, the state has not consistently applied, or demonstrated the intention to consistently apply, the promulgated requirement in similar circumstances at other remedial actions within the state; or

(6) For Fund-financed response actions only, an alternative that attains the ARAR will not provide a balance between the need for protection of human health and the environment at the site and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment.

(D) Each remedial action selected shall be cost-effective, provided that it first satisfies the threshold criteria set forth in §300.430(f)(1)(ii)(A) and (B). Cost-effectiveness is determined by evaluating the following three of the five balancing criteria noted in §300.430(f)(1)(i)(B) to determine overall effectiveness; long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness. Overall effectiveness is then compared to cost to ensure that the remedy is cost-effective. A remedy shall be cost-effective if its costs are proportional to its overall effectiveness.

(E) Each remedial action shall utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. This requirement shall be fulfilled by selecting the alternative that satisfies paragraph (f)(l)(ii) (A) and (B) of this section and provides the best balance of trade-offs among alternatives in terms of the five primary balancing criteria noted in paragraph (f)(1)(i)(B) of this section. The balancing shall emphasize long-term effectiveness and reduction of toxicity, mobility, or volume through treatment. The balancing shall also consider the preference for treatment as a principal element and the bias against off-site land disposal of untreated waste. In making the determination under this paragraph, the modifying criteria of state acceptance and community acceptance described in paragraph (f)(1)(i)(C) of this section shall also be considered.

(2) *The proposed plan.* In the first step in the remedy selection process, the lead agency shall identify the alternative that best meets the requirements in §300.430(f)(1), above, and shall present that alternative to the public in a proposed plan. The lead agency, in conjunction with the support agency and consistent with §300.515(e), shall prepare a proposed plan that briefly describes the remedial alternatives analyzed by the lead agency, proposes a preferred remedial action alternative, and

summarizes the information relied upon to select the preferred alternative. The selection of remedy process for an operable unit may be initiated at any time during the remedial action process. The purpose of the proposed plan is to supplement the RI/FS and provide the public with a reasonable opportunity to comment on the preferred alternative for remedial action, as well as alternative plans under consideration, and to participate in the selection of remedial action at a site. At a minimum, the proposed plan shall:

(i) Provide a brief summary description of the remedial alternatives evaluated in the detailed analysis established under paragraph (e)(9) of this section;

(ii) Identify and provide a discussion of the rationale that supports the preferred alternative;

(iii) Provide a summary of any formal comments received from the support agency; and

(iv) Provide a summary explanation of any proposed waiver identified under paragraph (f)(1)(ii)(C) of this section from an ARAR.

(3) *Community relations to support the selection of remedy.* (i) The lead agency, after preparation of the proposed plan and review by the support agency, shall conduct the following activities:

(A) Publish a notice of availability and brief analysis of the proposed plan in a major local newspaper of general circulation;

(B) Make the proposed plan and supporting analysis and information available in the administrative record required under subpart I of this part;

(C) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments on the proposed plan and the supporting analysis and information located in the information repository, including the RI/FS. Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days;

(D) Provide the opportunity for a public meeting to be held during the public comment period at or near the site at issue regarding the proposed plan and the supporting analysis and information;

(E) Keep a transcript of the public meeting held during the public comment period pursuant to CERCLA section 117(a) and make such transcript available to the public; and

(F) Prepare a written summary of significant comments, criticisms, and new relevant information submitted during the public comment period and the lead agency response to each issue. This responsiveness summary shall be made available with the record of decision.

(ii) After publication of the proposed plan and prior to adoption of the selected remedy in the record of decision, if new information is made available that significantly changes the basic features of the remedy with respect to scope, performance, or cost, such that the remedy significantly differs from the original proposal in the proposed plan and the supporting analysis and information, the lead agency shall;

(A) Include a discussion in the record of decision of the significant changes and reasons for such changes, if the lead agency determines such changes could be reasonably anticipated by the public based on the alternatives and other information available in the proposed plan or the supporting analysis and information in the administrative record; or

(B) Seek additional public comment on a revised proposed plan, when the lead agency determines the change could not have been reasonably anticipated by the public based on the information available in the proposed plan or the supporting analysis and information in the administrative record. The lead agency shall, prior to adoption of the selected remedy in the ROD, issue a revised proposed plan, which shall include a discussion of the significant changes and the reasons for such changes, in accordance with the public participation requirements described in paragraph (f)(3)(i) of this section.

(4) *Final remedy selection.* (i) In the second and final step in the remedy selection process, the lead agency shall reassess its initial determination that the preferred alternative provides the best balance of trade-offs, now factoring in any new information or points of view expressed by the state (or support agency) and community during the public comment period. The lead agency

shall consider state (or support agency) and community comments regarding the lead agency's evaluation of alternatives with respect to the other criteria. These comments may prompt the lead agency to modify aspects of the preferred alternative or decide that another alternative provides a more appropriate balance. The lead agency, as specified in §300.515(e), shall make the final remedy selection decision and document that decision in the ROD.

(ii) If a remedial action is selected that results in hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure, the lead agency shall review such action no less often than every five years after initiation of the selected remedial action.

(iii) The process for selection of a remedial action at a federal facility on the NPL, pursuant to CERCLA section 120, shall entail:

(A) Joint selection of remedial action by the head of the relevant department, agency, or instrumentality and EPA; or

(B) If mutual agreement on the remedy is not reached, selection of the remedy is made by EPA.

(5) *Documenting the decision.* (i) To support the selection of a remedial action, all facts, analyses of facts, and site-specific policy determinations considered in the course of carrying out activities in this section shall be documented, as appropriate, in a record of decision, in a level of detail appropriate to the site situation, for inclusion in the administrative record required under subpart I of this part. Documentation shall explain how the evaluation criteria in paragraph (e)(9)(iii) of this section were used to select the remedy.

(ii) The ROD shall describe the following statutory requirements as they relate to the scope and objectives of the action:

(A) How the selected remedy is protective of human health and the environment, explaining how the remedy eliminates, reduces, or controls exposure to human and environmental receptors;

(B) The federal and state requirements that are applicable or relevant and appropriate to the site that the remedy will attain;

(C) The applicable or relevant and appropriate requirements of other federal and state laws that the remedy will not meet, the waiver invoked, and the justification for invoking the waiver;

(D) How the remedy is cost-effective, i.e., explaining how the remedy provides overall effectiveness proportional to its costs;

(E) How the remedy utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable; and

(F) Whether the preference for remedies employing treatment which permanently and significantly reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or contaminants as a principal element is or is not satisfied by the selected remedy. If this preference is not satisfied, the record of decision must explain why a remedial action involving such reductions in toxicity, mobility, or volume was not selected.

(iii) The ROD also shall:

(A) Indicate, as appropriate, the remediation goals, discussed in paragraph (e)(2)(i) of this section, that the remedy is expected to achieve. Performance shall be measured at appropriate locations in the ground water, surface water, soils, air, and other affected environmental media. Measurement relating to the performance of the treatment processes and the engineering controls may also be identified, as appropriate;

(B) Discuss significant changes and the response to comments described in paragraph (f)(3)(i)(F) of this section;

(C) Describe whether hazardous substances, pollutants, or contaminants will remain at the site such that a review of the remedial action under paragraph (f)(4)(ii) of this section no less often than every five years shall be required; and

(D) When appropriate, provide a commitment for further analysis and selection of long-term response measures within an appropriate time-frame.

(6) *Community relations when the record of decision is signed.* After the ROD is signed. the lead agency shall:

(i) Publish a notice of the availability of the ROD in a major local newspaper of general circulation; and

(ii) Make the record of decision available for public inspection and copying at or near the facility at issue prior to the commencement of any remedial action.

40 C.F.R. §300.435 (1990) Remedial design/remedial action, operation and maintenance.

* * *

(c) *Community relations.* (1) Prior to the initiation of RD, the lead agency shall review the CRP to determine whether it should be revised to describe further public involvement activities during RD/RA that are not already addressed or provided for in the CRP.

(2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance or cost, the lead agency shall consult with the support agency, as appropriate, and shall either:

(i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:

(A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under §300.815 and the information repository; and

(B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or

(ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent

decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost. To amend the ROD, the lead agency, in conjunction with the support agency, as provided in §300.515(e), shall:

(A) Issue a notice of availability and brief description of the proposed amendment to the ROD in a major local newspaper of general circulation;

(B) Make the proposed amendment to the ROD and information supporting the decision available for public comment;

(C) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written or oral comments on the amendment to the ROD. Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days;

(D) Provide the opportunity for a public meeting to be held during the public comment period at or near the facility at issue.

(E) Keep a transcript of comments received at the public meeting held during the public comment period;

(F) Include in the amended ROD a brief explanation of the amendment and the response to each of the significant comments, criticisms, and new relevant information submitted during the public comment period;

(G) Publish a notice of the availability of the amended ROD in a major local newspaper of general circulation; and

(H) Make the amended ROD and supporting information available to the public in the administrative record and information repository prior to the commencement of the remedial action affected by the amendment.

(3) After the completion of the final engineering design, the lead agency shall issue a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action.

* * *

Subpart H — Participation by Other Persons
40 C.F.R. §300.700 (1990) Activities by other persons.

* * *

(c) *Section 107(a) cost recovery actions.* (1) Responsible parties shall be liable for all response costs incurred by the

United States government or a State or an Indian tribe not inconsistent with the NCP.

(2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other persons consistent with the NCP.

(3) For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup;

(ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

(4) Actions under §300.700(c)(1) will not be considered "inconsistent with the NCP," and actions under §300.700(c)(2) will not be considered not "consistent with the NCP," based on immaterial or insubstantial deviations from the provisions of 40 CFR part 300.

(5) The following provisions of this part are potentially applicable to private party response actions:

(i) Section 309.150 (on working health and safety);

(ii) Section 300.160 (on documentation and cost recovery);

(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;

(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);

(v) Section 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6);

(vi) Section 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(5), and (f), and including §300.415(i) with regard to meeting ARARs where practicable except that private

party removal actions must always comply with the requirements of applicable law;

(vii) Section 300.420 (on remedial site evaluation);

(viii) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(8) and that applicable requirements of federal or state law may not be waived by a private party; and

(ix) Section 300.435 (on RD/RA and operation and maintenance).

(6) Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on the provisions set out below, or based on substantially equivalent state and local requirements. The following provisions of this part regarding public participation are potentially applicable to private party response actions, with the exception of administrative record and information repository requirements stated therein:

(i) Section 300.155 (on public information and community relations);

(ii) Section 300.415(m) (on community relations during removal actions);

(iii) Section 300.430(c) (on community relations during RI/FS) except paragraph (c)(5);

(iv) Section 300.430(f)(2), (3), and (6) (on community relations during selection of remedy); and

(v) Section 300.435(c) (on community relations during RD/RA and operation and maintenance).

(7) When selecting the appropriate remedial action, the methods of remedying releases listed in Appendix D of this part may also be appropriate to a private party response action.

(8) Except for actions taken pursuant to CERCLA sections 104 or 106 or response actions for which reimbursement from the Fund will be sought, any action to be taken by the lead agency listed in paragraphs (C)(5) through (c)(7) may be taken by the person carrying out the response action.

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

No. 90-1221

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.
and LITTON INDUSTRIES, INC.,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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March 4, 1991

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the courts below erred in finding that GE's excavation and disposal of hazardous substances at a particular site constituted a "removal" action within the meaning of the now-superseded 1985 National Contingency Plan.

2. Whether Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), which expressly authorizes recovery of the costs of "enforcement activities" as an element of the total "response costs" incurred in removing hazardous substances, permits GE to recover attorneys fees reasonably incurred in obtaining reimbursement.

RULE 29.1 STATEMENT

The respondent in these proceedings is the General Electric Company, which has no parent corporation and no subsidiaries that are not wholly owned.

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Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

General Electric Company ("GE") hereby opposes the petition for a writ of certiorari filed in this case.

STATEMENT

1. This case involves GE's cleanup of hazardous wastes that were dumped in a field in Springfield, Missouri, during 1959-1962 by a company that was purchased and operated by petitioners. Specifically, petitioners are solely responsible for concentrations of "copper, chrome, zinc, lead and cyanide" that were placed at the site as wastes

from a typewriter factory they operated. Pet. App. A20. Although petitioners repeatedly (Pet. 3, 14) dismiss as trivial the environmental risks for which they are responsible, it is undisputed that the wastes were located a few hundred feet from residential neighborhoods to the north, apartment complexes to the west and a major street to the south. Pet. App. A13. Moreover, both the Missouri Department of Health and the courts below found that the site posed a substantial health risk to children and others in those areas. Pet. App. A3, A19, A21, A30.

In March 1970, GE purchased the site from petitioners. Petitioners did not disclose their dumping to GE and GE did not become aware of it until the summer of 1980. Initially, both GE and the state's environmental agency, the Missouri Department of Natural Resources ("MDNR"), concluded that there was no significant health risk that required cleanup work at the site. Pet. App. A2. However, in 1985, after GE arranged to sell the site to a third party, the MDNR conducted a new investigation and concluded that a significant health threat did exist. As the Environmental Protection Agency explained, "what was considered to be trace amounts in 1981 are now acknowledged as representing a threat to human health and the environment." Pet. App. A19-A20.

In response, GE employed an environmental engineering firm to study the site and to make recommendations concerning the proper response. GE then "engaged in a proper assessment of the potential hazard and evaluation of the alternative modes of remediation," and "selected the remedy that was the most cost effective in the long run." Pet. App. A40-A41.

During this period both GE and the purchaser of the property notified petitioners of the problem at the site and strongly encouraged petitioners to participate in both the planning and implementation of the site cleanup. In response, petitioners refused to "participate[] in any

of the investigation, evaluation, or cleanup of the site." Pet. App. A3-A4. Accordingly, GE entered into a consent decree with the site purchaser and the MDNR to develop and implement a cleanup plan that would be consistent with the National Contingency Plan ("NCP") of 1985, which implemented CERCLA until recently. 40 C.F.R. § 300 *et seq.* (1986). Under the decree, the planning and performance of GE's cleanup was fully monitored and approved by the MDNR.[1]

GE then proceeded to clean up the site pursuant to the decree, beginning in October 1986. Almost immediately after excavation began, GE found several drums buried just below the surface, one of which contained "extremely hazardous substances." Pet. App. A3. Cleanup was discontinued in December 1986, to permit additional site analysis after the drums were discovered, and excavation was not resumed until May 1987. The removal process was completed in December 1987. Pet. App. A3. When GE's cleanup was complete, MDNR determined that GE had complied fully with the decree and the work plan MDNR had approved, and the MDNR declared the site safe for future development and use. Pet. App. A23.

2. GE filed the instant lawsuit pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, seeking to recover from petitioners the cost of cleaning up the hazardous wastes for which petitioners were solely responsible. Petitioners' primary argument was that GE's action had constituted a "remedial action" and not a "removal" action, and that GE had not complied strictly with all of the NCP requirements for a remedial action. In particular, petitioners

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[1] The MDNR held three public meetings of the Missouri Hazardous Waste Management Commission concerning the site during the course of its assessment. The third meeting was held after the excavation option had been tentatively selected but before it had been formally approved and before the consent decree was entered. In fact, public input caused a change in the method selected for disposing of the removed wastes. Pet. App. A24.

argued that greater public participation should have been required. Accordingly, they argued that GE was not entitled to recover its costs under Section 107.

After a four-day bench trial, the district court held that all of the costs were properly recoverable under Section 107. The court found that the cleanup did constitute a "removal" within the meaning of the statute, but also held that whether GE's action was labeled as removal or remedial was irrelevant because, under either approach, GE's actions were consistent with the 1985 NCP. The court also found that every cost incurred by GE was necessary to comply with MDNR requirements. Pet. App. A22. Finally, the district court awarded GE its attorneys fees in prosecuting the action as recoverable "enforcement" costs permitted under Section 107. Pet. App. A16-A43.

The court of appeals affirmed unanimously. Pet. App. A1-A14. The court of appeals based its decision on the district court's findings that the cleanup was a removal and that GE had complied completely with the NCP requirements for removal of wastes. Pet. App. A7, A9. In analyzing the issue this way, the court of appeals followed the course proposed by the United States as *amicus curiae*. The government expressed some concern about what type of public participation would be sufficient when a cleanup is pursued as a remedial action, but argued that the court of appeals did not have to address the issue because GE's action properly was found to have been a removal action in conformity with the 1985 NCP. App., *infra* at 17a.[2] Accordingly, the United States urged the court of appeals to affirm.

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[2] Petitioners have seriously distorted the thrust of the United States' brief before the court of appeals. But, instead of engaging in a lengthy rebuttal, which would merely beg the question of which party was accurately describing the brief, GE has reproduced the United States' brief in full as an appendix to this Opposition. Suffice it to say, however, that "the importance for this Court of

The court of appeals also held that GE was entitled to attorneys fees. It reasoned that "it would strain the statutory language to the breaking point to read [attorneys fees] out of the 'necessary costs' that [CERCLA] allows private parties to recover." Pet. App. A13.

DISCUSSION

1. Petitioners argue initially that the courts below erred in finding that GE's excavation constituted a "removal" within the meaning of the statute. But this argument is inherently factbound. Moreover, the holding on this issue is correct, conflicts with no decision of any other court and accordingly does not warrant further review. Even if the issue otherwise seemed worthy of review, this would be the wrong case in which to decide it. First, the specific question posed here has extremely limited prospective significance because it depends upon GE's compliance with the 1985 NCP, which has been superseded by a 1990 plan. Additionally, petitioners are hardly the proper party to press the public interest claims they assert in this Court.

a. It is difficult to imagine an issue less worthy of review by this Court than the narrow question of whether GE's excavation of a site in Springfield, Missouri constituted a "removal" within the meaning of CERCLA. Nevertheless, in trying to convert this into an issue of broader significance, petitioners argue that there are two absolute pre-conditions to a removal which were ignored by the court of appeals. First, they assert that removal is only appropriate in response to an "imminent threat" of harm. Second, they argue that there is an absolute one-

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the decision below" is not enhanced simply because the government appeared solely for the purpose of persuading that court to do precisely what it did. To the contrary, the court's willingness to adopt the government's analysis merely "highlights" (Pet. 9) the correctness of that holding.

year time limit for accomplishing a removal. Neither assertion has merit.

First, contrary to petitioners' claim, neither CERCLA nor the 1985 NCP contains any requirement of "imminent" risk. The NCP expressly authorizes a removal action whenever *any* health threat exists. 40 C.F.R. § 300.65 (b)(1) (1988) (Pet. App. A66) (removal action authorized where "a threat to public health or welfare" exists). Indeed, at the time EPA adopted the 1985 NCP, the EPA specifically rejected an effort to require an "imminent threat" as a condition of initiating a removal action. See 50 Fed. Reg. 47,930 (1985) (explaining why "imminent danger" comments were not adopted). In the 1985 NCP, the EPA abandoned the standards and procedures for "immediate" and "planned" removal actions that existed under the 1982 NCP, 40 C.F.R. §§ 300.65-.67 (1985), in favor of a single unified and more flexible "removal" action triggered by the "threat to public health" standard in the 1985 NCP.

Under the proper "threat to public health" standard, it is clear that the decision approving this removal was correct. The court of appeals, the district court, the EPA, and the Missouri administrative agencies all have carefully reviewed the evidence and have unanimously concluded that the wastes petitioners dumped on this site constituted a hazard sufficient to warrant GE's removal action.

Second, petitioners cite nothing for the unbending rule that an excavation that is forced to continue beyond a set period of time is necessarily converted into a remedial action. The NCP explicitly exempts private party removal actions, such as GE's here, from such limitations. 40 C.F.R. § 300.65(i) (1988) (Pet. App. A68-A69). Nor is there any case or regulatory support for such a rule. Instead, the cases cited by petitioners (Pet. 13-14) merely indicate that, in general, removals are of a shorter duration than remedial actions. See, *e.g.*, *Exxon Corp.* v. *Hunt*,

475 U.S. 355 (1986) (general description of regulatory scheme in case involving unrelated issue of preemption). Nothing in the decision below conflicts with those statements.

This case well illustrates, however, why an unbending rule, such as the one petitioners propose, makes no sense. The removal here would clearly have been completed in a much shorter period of time if GE had not discovered drums and additional hazardous wastes once the excavation began. For that reason, and with MDNR approval, GE halted the removal process to assess more fully the environmental risks. After that assessment, GE proceeded to complete the removal. The entire process lasted longer than a year, but the actual excavation and removal portions of the cleanup took a considerably shorter time and one that the courts below correctly found was fully consistent with a removal action. See page 3, *supra*.

Finally, petitioners' effort categorically to exclude GE's cleanup from the definition of removal is completely undermined by the regulation defining that term. The 1985 NCP removal provision expressly declares removal of contaminated drums and highly contaminated soils, which are at issue here, to be *"as a general rule, appropriate"* for a removal action. 40 C.F.R. § 300.65(c)(6) & (7) (1988) (Pet. App. A67) (emphasis supplied). In sum, there is nothing in the decision on removal in this case that transcends the Springfield, Missouri site.

b. Even if the removal issue were arguably incorrectly decided and somehow presented a legal issue, it is clear that the holding concerning compliance with the 1985 NCP has limited prospective significance. In response to the 1986 SARA amendments,[3] the EPA has promulgated a new 1990 NCP that substantially alters the provisions of

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[3] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA") (codified as amended at 42 U.S.C. § 9601 *et seq.*).

the 1985 NCP in the very areas on which petitioners now focus—removal and remedial actions.[4] Because the NCP in effect at the time response costs are incurred will govern the recoverability of those costs, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986), any interpretation by this Court of the now superseded NCP would be of limited applicability for future cases.

c. Finally, petitioners' arguments extolling the virtues of public participation in the cleanup of hazardous wastes are disingenuous. Petitioners basically argue that GE made the site too clean, and that greater public involvement was important to increase the likelihood that a less effective method of cleanup might have been adopted. It is nonsense for petitioners to suggest that the public might have urged a *less* protective or effective remedy than that approved by the state agencies responsible for protecting the public health and welfare.[5]

Nor was greater opportunity for public participation necessary to ensure that petitioners themselves were informed about GE's cleanup efforts. As the district court

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[4] As a result of the EPA's revisions to the NCP, the 1990 NCP imposes new substantive requirements for both removals and remedial actions, in the types of assessments preceding each, in the standards applied to each, and in the public participation associated with each. Compare, *e.g.*, 40 C.F.R. §§ 300.64 and 300.65 (1988) (Pet. App. A65) with 40 C.F.R. §§ 300.410 and 300.415 (1990) (Pet. App. A88-A96).

[5] Petitioners' repeated assertions that GE somehow acted improperly in its sale of the site to a third party and that GE engaged in gold plating in its removal actions are completely contradicted by the findings of the lower courts. With respect to the sale, the district court pointedly found that petitioners have "not been injured nor prejudiced by any actions of GE regarding the subsequent sale of the property." Pet. App. A27. Moreover, all of the costs were found to have been necessary to effect compliance with the 1985 NCP as enforced by the state agency. Pet. App. A11, A40-A41. Petitioners simply have no factually supported basis for complaining about the ultimate costs of a removal in which they refused to participate.

pointedly observed, petitioners already "had every opportunity to participate in the clean-up but failed to do so." Pet. App. A41. Under these circumstances, petitioners' claim that interests in public participation were somehow impaired by the removal in this case is completely hollow.

2. Petitioners argue that the courts below erred in holding that attorneys fees are recoverable under Section 107 by a party such as GE—which has incurred all of the costs of removal of hazardous wastes and which seeks nothing more than reimbursement—from the party who is responsible for the wastes and who has refused to participate in any way in the cleanup. The holding of the Eighth Circuit, however, is based squarely on the text of the statute and unquestionably promotes the essential purposes of CERCLA. Moreover, petitioners acknowledge that the decision of the court of appeals is the first appellate decision on this question. Thus, even if the holding were less clearly correct, the issue still would not warrant review now.

There is a clear textual authorization for the fee recovery in the statute. Under Section 107 of CERCLA, liable parties such as petitioners are liable for any necessary "costs of response." 42 U.S.C. § 9607(a)(4)(B). Under Section 101 of CERCLA, the term "response" means "remove, removal, remedy, and remedial action, *all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.*" 42 U.S.C. § 9601(25) (1988) (emphasis added). As both courts below concluded, "enforcement activities" was a reference to activities to enforce CERCLA's cost recovery provisions, including attorneys fees and expenses.[6] As another court has held,

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[6] The "enforcement activities" language was added to CERCLA by the SARA amendments. Prior to 1986, the term "response" was defined as meaning "remove, removal, remedy, and remedial action." 42 U.S.C. 9601(25) (1982). The 1986 SARA amendments added on the end of that definition that "[a]ll such terms (including the

> Congress intended for "enforcement activities" to include attorneys fees expended to induce a responsible party to comply with the remedial actions mandated by CERCLA. This court cannot ascertain any other logical interpretation which would give effect to this phrase. If this court were to rule otherwise, the phrase "enforcement activities" would be superfluous.

Pease & Curren Ref., Inc. v. *Spectrolab, Inc.*, 744 F. Supp. 945, 949-52 (C.D. Cal. 1990). *Accord Shapiro* v. *Alexanderson*, 741 F. Supp. 472, 480, *reh'g denied*, 743 F. Supp. 268 (S.D.N.Y. 1990).

Even petitioners seem to concede that Congress inserted the term "enforcement activities" to make certain that the recovery of attorneys fees, which had been upheld in a few government cost recovery cases, would continue. Pet. 17. However, citing irrelevant legislative history,[7] petitioners incorrectly argue that Congress only intended for the government to recover attorneys fees, and not for private parties to do so.

This argument is refuted by the statute itself. The SARA amendments placed the "enforcement" language in a general definitional section which applies to *all* parties—both governmental and private—acting under Section 107 of CERCLA. Had Congress intended to limit the recovery of attorneys fees to the government, Congress

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terms 'removal' and 'remedial action') *include enforcement activities related thereto.*" 42 U.S.C. § 9601(25) (1988) (emphasis added).

[7] Petitioners argue that Congress intended the "enforcement" language to cover attorneys fees, but *only the EPA's attorneys fees.* Petitioners' sole support for this argument is a House Report, H.R. Rep. No. 253, which stated that the SARA amendment related to EPA's cost recovery. Pet. 17. However, this Report was attached to a bill that did *not* become law, H.R. 2817, see 1986 U.S. Code Cong. & Admin. News 2835, and the conference report to the bill which did become law has no such EPA-restricted language. H.R. Conf. Rep. 962, 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276.

would not have placed the amendment in a provision of general applicability. Congress could have placed the amendment in a CERCLA section applicable only to the government,[8] or it could have expressly qualified the right. There is, however, nothing inherent in the phrase "enforcement activities" to suggest it should be limited to governmental, as opposed to private, enforcement activities: courts have repeatedly characterized private party CERCLA cost-recovery actions as "private enforcement." *Wickland Oil Terminals*, 792 F.2d at 892 ("private enforcement actions under section 107(a)"); *Cadillac Fairview/California, Inc.* v. *Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) ("private enforcement actions").

GE invoked Section 107 in precisely the same way the United States does when it seeks to collect CERCLA response costs. Given that private parties have the right to bring cost-recovery actions under CERCLA, that both the government and private parties look to the same provision for recovery of response costs, and that the definition of "response" is the same for *all parties* pursuing an action under Section 107, petitioners cannot reasonably contend that there is no authority for recovery of attorneys fees. Accordingly, because the attorneys fee award in this case is fully supported by the statutory language and by the articulated Congressional purposes of encouraging voluntary cleanups and settlements, the petition should be denied.

Finally, even if the statutory authorization for fee recovery was not as clear as it is, there are relatively few

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[8] Section 104, cited by petitioners, authorizes the Government to perform environmental responses, to incur expenses in connection therewith, and to pursue cost recovery actions for reimbursement. When the Government files such actions, however, it does so under Section 107, the section which defines cost recovery actions and creates the liability for "any other necessary costs of response." The relief obtainable flows from Section 107, as defined in Section 101(25), and is the same relief available to private parties when they act under this provision.

cases interpreting this statute and no case other than this one has reached a court of appeals. Until such time as an appellate court rejects the persuasive reasoning of the Eighth Circuit, it is clearly premature for this Court to consider the issue.

* * * *

At the end of the day, this is a case that should never have required litigation. Petitioners were responsible for all of the hazardous wastes; they had complete knowledge of both their responsibility and GE's proposed course of action. GE performed the response action effectively and included no unnecessary costs. Petitioners simply ignored the problem. What they should have done was to reach some agreement with GE (either before or after removal) with respect to these costs. Instead, petitioners have fought, now all the way to this Court, to avoid their responsibility. The fight should end now; the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 4, 1991

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2845 WM

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellee,

v.

LITTON BUSINESS SYSTEMS, INC.,
Defendant-Appellant

On Appeal From the United States District Court
for the Western District of Missouri

BRIEF FOR THE UNITED STATES, *AMICUS CURIAE*

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

In this case, General Electric Company (GE) filed a private cost recovery action against Litton Business Systems under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a). GE sought recovery of nearly $1 million in costs incurred in removing hazardous substances from a site GE bought from Litton in 1970. After a trial, the district court (Clark, J.) found Litton liable for all response costs incurred by GE. 715 F. Supp. 949. The court rejected Litton's contention that GE had not complied with the public comment requirement of the National Contingency Plan, and determined that GE's "compliance with legally applicable or relevant appropriate state requirements provides a substantially equivalent opportunity for public involvement" (*id.* at 961), stating that "if notice to the public is a requirement, the input of the Missouri Department of Natural Resources serves as a substitute for public comment." *Id.* Based on GE's documented cooperation with the State, the court concluded that GE's actions were "consistent with the NCP." *Id.* at 961; see *id.* at 963. The court also rejected Litton's "unclean hands" defense, ruling that the equitable principle did not apply in this case because GE's alleged misconduct neither injured nor prejudiced Litton (*id.* at 955); it questioned whether that principle could ever apply in an action under CERCLA. *Ibid.*

Litton now appeals from that judgment. Since the United States is appearing solely as *amicus curiae*, we express no view with regard to oral argument.

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No. 89-2845 WM

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellee

v.

LITTON BUSINESS SYSTEMS, INC.,
Defendant-Appellant

On Appeal From the United States District Court
for the Western District of Missouri

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINION BELOW

The opinion of District Judge Russell G. Clark appears at Joint Appendix 5 and is reported at 715 F. Supp. 949.

STATEMENT OF JURISDICTION

The judgment was entered on June 20, 1989, and a timely notice of appeal was filed by Litton Business Systems, Inc. on November 13, 1989, pursuant to 28 U.S.C. 2107 and Fed. R. Civ. P. 4(a)(1). The jurisdiction of this Court rests on 28 U.S.C. 1291.

ISSUE PRESENTED

Whether compliance with state regulatory provisions concerning removing hazardous substances from a particular site satisfies the prerequisites for recovering response costs for actions under Section 107(a)(4)(B) of

the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as specified in the "National Contingency Plan" (NCP) adopted by the Environmental Protection Agency, 40 C.F.R. 300.1 *et seq.*, including any applicable public participation requirements.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Due to their length, Sections 107(a), 101(23) and (24) of CERCLA, 94 Stat. 2796, as amended, 42 U.S.C. 9607(a), 9601(23) and (24), and 40 C.F.R. 300.65, 300.71 and 300.67(d), are reproduced as an Addendum to this brief.

INTEREST OF THE UNITED STATES AND SUMMARY OF ARGUMENT

The United States agrees that the district court reached the correct result on the public participation issue in this case. Based upon the evidence available to it, the United States believes that the record in this case indicates that the General Electric Co. (GE) action may have been a "removal" action (CERCLA Section 101(23)) to which no public participation requirements attach, and that even if the action were considered to be a "remedial" action (CERCLA Section 101(24)), the record supports a conclusion that GE substantially complied with the NCP's requirement for "public comment." We also believe that the court properly rejected defendant Litton's unclean hands argument. The chief reason of the United States for participating in this appeal is to assist this Court in developing a sound rationale for this result.

We are uneasy about the district court's articulation of the standards for a private party's compliance with the pertinent NCP public participation requirements for *remedial* actions. The district court concluded, first, that no public hearing was required because GE complied with the legally applicable or relevant and appropriate state

requirements (ARARs) that the substances be removed. 715 F. Supp. at 961. Second, the court proffers an alternative ground for NCP compliance by stating that the state's "input" on GE's response action served as a substitute for public comment. *Ibid.* To the extent that the district court's opinion may be read as suggesting that compliance with substantive state regulatory waste-removal provisions alone satisfies the public participation requirements for remedial actions, this conclusion is wrong because it belittles the importance of the public participation contemplated by the NCP. Accordingly, the United States wishes to emphasize that compliance with a state regulatory provision may satisfy the federal NCP requirement for public participation during selection of a remedial action, but only if that provision in fact offers "substantially equivalent" opportunities for public comment.

It is established policy under CERCLA to encourage private parties to perform voluntary cleanups. See *Exxon v. Hunt*, 475 U.S. 355, 359 (1986). Cleanups which are undertaken and financed by private parties serve to enhance the enforcement efforts of EPA and to preserve the resources of the Superfund for use at sites without identified or financially viable responsible parties. Accordingly, it is important that technical obstacles not prevent these parties from recovering their response costs from those who are responsible for the contamination. The application of a rigid, formalistic test to a party's compliance with the public comment requirement for remedial actions would, in the view of the United States, serve as a disincentive to voluntary cleanups.[1] Nevertheless, this policy must be balanced against the interest that the public has in participating in the selection of a response

[1] Additionally, The United States could be prejudiced if technical inconsistencies with the NCP precluded recovery by the Environmental Protection Agency (EPA) in its enforcement actions. 42 U.S.C. 9607(a)(4)(A).

action, and the interest of the public in assuring that an environmentally sound cleanup occurs.

The United States believes that this Court, in resolving this matter, should not apply an overly restrictive test for compliance with the public comment requirement for remedial actions. One of Congress' principal purposes in enacting CERCLA was to place the costs and responsibility for remedying harmful conditions caused by hazardous waste disposal on those responsible for the problem. See, *e.g.*, *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986). Similarly, the United States does not want to discourage private parties from cleaning up hazardous waste sites by encouraging excessive formalism; the Environmental Protection Agency believes that private party cost recovery should be allowed where it proceeds in "substantial" compliance with EPA's regulations, including the requirement that concerned parties be allowed to review and evaluate proposed remedial actions. The 1985 NCP was designed to encourage more private sector cleanups —cleanups that had been discouraged by courts' restrictive readings of Section 107(a)(4)(B)'s requirement of consistency with the NCP. See Note, "Developments in the Law—Toxic Waste Litigation," 99 Harv. L.Rev. 1458, 1503 (1986) (by including the public comment requirement concerning the selection of a remedial action, the NCP "prevents the streamlined response that should be the primary advantage of private party cleanups."). For these reasons, the United States has determined to participate as *amicus* in this case to assist this Court in defining the rules for private party compliance with the NCP public participation requirements.

In this brief, we will first clarify what distinguishes a "removal" from a "remedial" action, and explain what public participation standards are applicable to both types of actions under the NCP. We will point out, first, that there would be no applicable public partici-

pation requirements if this clean up were viewed as a removal rather than a remedial action (see *supra* at 9). Second, if the cleanup is considered a remedial action, there must be opportunities for public participation substantially equivalent to those called for in the NCP (*supra* at 16). Finally, we will explain why "unclean hands" is not an available defense to liability in CERCLA cost recovery actions.

STATEMENT

1. *Statutory and regulatory framework.*—Congress enacted CERCLA, 94 Stat. 2796, 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, as a legislative response to the growing problem of toxic wastes, many of which were disposed of before their dangers were widely known and had contaminated land and water resources. The statute attempts to create a coherent answer to two related problems: the emergency abatement of releases of hazardous substances into the environment and the response, both short- and long-term, to the presence of hazardous substances in existing disposal sites. See *Lone Pine Steering Committee v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986). Many of these sites had been abandoned by any party who could be held accountable for the cleanup. Whenever possible, however, CERCLA places the ultimate financial burden of toxic waste cleanup on those responsible for creating the harmful conditions. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986); *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989).

Section 105 of CERCLA authorizes the President to incorporate into the national contingency plan (NCP) "procedures and standards for responding to releases of hazardous substances." 42 U.S.C. 9605. Section 221 established the Hazardous Substance Response Trust Fund,

popularly known as the "Superfund." 42 U.S.C. 9631.[2] Superfund monies finance response measures by the Environmental Protection Agency that are consistent with the national contingency plan. CERCLA Sections 104 and 111(a)(1), 42 U.S.C. 9604 and 9611(a)(1). They also finance private response costs that are approved under the NCP and are federally certified. Section 111 (a)(2), 42 U.S.C. 9611(a)(2). In addition, under Section 106 the federal government may seek injunctive relief from the actual or threatened release of a hazardous substance. 42 U.S.C. 9606. Section 107(a)(4)(A) makes certain parties responsible for the presence of hazardous substances liable to federal and state governments and Indian tribes for response costs. 42 U.S.C. 9607(a)(4)(A). For example, current owners and operators of the property are liable under Section 107(a)(1), while former owners and operators such as Litton are liable under Section 107(a)(2). Other categories of liable persons include "transporters" and "generators" of hazardous substances. 42 U.S.C. 9607(a)(3)-(4). *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d at 1377. Similarly, Section 107(a)(4)(B), makes responsible parties liable to private persons for response costs. 42 U.S.C. 9607(a)(4)(B). In those situations in which the party seeking recovery is also statutorily liable the claim may be one for contribution which is authorized under Section 113(f)(1). 42 U.S.C. 9613(f)(1). See *Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 88-89 (3rd Cir. 1988), cert. denied, 109 S. Ct. 837 (1989).

CERCLA Section 107(a)(4)(B), the focal point of this case, expressly creates a private cause of action against Section 107(a)-responsible parties for the recovery of "necessary costs of response incurred by any other person consistent with the national contingency

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[2] Repealed by SARA; the Hazardous Substance Superfund is currently established under 26 U.S.C. 9507.

plan [NCP]." 42 U.S.C. 9607(a)(4)(B).[3] (The NCP is the set of regulations promulgated by the EPA that govern response actions for hazardous substance releases and provide appropriate guidelines for state and federal agencies. See 40 C.F.R. 300.1 *et seq.*) [4]

The statute was designed primarily to facilitate the prompt cleanup of hazardous substances sites. It accomplishes this purpose by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes. *Exxon v. Hunt*, *supra*; *Walls v. Waste Resources Corp.*, 761 F.2d 311, 318 (6th Cir. 1985). Allowing a private action to recover response costs from

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[3] An action for natural resource damages may be brought only by the United States, a state government, or an Indian tribe. *Id.* Section 107(f), 42 U.S.C. 9607(f). Response actions taken by the United States, a state government, or an Indian tribe are presumed to be "not inconsistent with the national contingency plan" under Section 107(a)(4)(A); the defendant has the burden of proving otherwise. *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 747 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Conversely, private plaintiffs have the burden of proving that their response actions are "consistent with the national contingency plan" under Sectior 107(a)(4)(B). *Artesian Water Co. v. Gov. of New Castle County*, 659 F. Supp. 1269, 1277 n.8 (D. Del. 1987) (citations omitted); aff'd on other grounds, 851 F.2d 643 (3d Cir. 1988); *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 268 (E.D. N.Y. 1986); *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1444 (S.D. Fla. 1984).

[4] The NCP constitutes EPA's national regulations adopted under Section 105 of CERCLA appearing at 40 C.F.R. 300.1-300.81. The regulations describe methods of responding to hazardous substance releases and set forth guidelines for the appropriate roles of state and federal agencies and private parties. Judicial review of these regulations can be had only by filing a petition for review in the District of Columbia Circuit under Section 113(a) of CERCLA, 42 U.S.C. 9613(a). The NCP cannot be challenged in district court in the context of a cost recovery action. On February 2, 1990, the EPA Administrator signed a final rule revising the NCP; that rule will take effect 20 days after publication in the Federal Register. Publication is expected by the end of February.

responsible parties under Section 107(a)(4)(B) is thus consistent with both the language of that Section and the congressional purpose underlying CERCLA as a whole.

CERCLA delineates two types of response actions—"removal" and "remedial" actions, see Section 101(23) and (24), each of which must comply with certain requirements under the NCP. Removal actions are generally short-term environmental responses. Remedial actions, on the other hand, are generally long-term responses. *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 795 (D. N.J. 1989).[5] For removal actions, the NCP provides for relatively simple procedural prerequisites. See 40 C.F.R. 300.65. Section 300.65 of the NCP sets forth no requirements for opportunities for public comment for private party removal actions (except to the extent such opportunities are required by legally applicable or relevant and appropriate state requirements (ARARs) and are practicable).[6]

With respect to remedial actions, however, the NCP provides for substantially more detailed procedural and

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[5] For example, the 1985 version of the NCP that applies here, with a number of exceptions, sets a $1 million limit or a six-month deadline for a *Superfund-financed* "removal action." 40 C.F.R. 300.65(b)(3). On October 17, 1986, the Superfund Amendment and Reauthorization Act extended the limits to 1 year and $2 million for a CERCLA removal action. 42 U.S.C. 9604(c)(1). The statute also allows exceptions to these limits.

[6] The NCP does require that removal actions taken "pursuant to section 300.65" include a formal community relations plan for actions extending beyond 45 days and have a spokesperson to inform the community of actions taken and respond to inquiries. 40 C.F.R. 300.67. While this requirement appears to apply to state, federal lead or tribal removals, private party actions are not taken "pursuant to section 300.65" and thus are not specifically required to meet these same requirements; rather, 40 C.F.R. 300.71(a)(2)(i) simply requires private party actions to be "consistent with" Section 300.65. (To the extent the requirement in 40 C.F.R. 300.67(b) is found to apply, the public meetings at which the site was discussed appear to satisfy the requirement.)

substantive requirements. See 40 C.F.R. 300.68. In particular, the NCP requires, among other things, that a private party contemplating the undertaking of a remedial action must first provide an opportunity for "appropriate public comment" unless compliance with a state regulatory provision "provides a substantially equivalent opportunity for public involvement on the choice of remedy." 40 C.F.R. 300.71(a)(2)(ii)(D).

The distinction between public participation regulations for removal as opposed to remedial actions is important because removal actions need comply only with the relatively simple NCP requirements set forth at 40 C.F.R. 300.65, whereas remedial actions must comport with "more detailed procedural and substantive provisions of the NCP" set forth at 40 C.P.R. 300.68. *Amland, supra* (citations omitted); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1577-1578 (E.D. Pa. 1988).

2. *The facts of this controversy.*—In this case, GE brought a private party recovery action pursuant to Section 107(a)(4)(B) of CERCLA against Litton Business Systems, Inc. (Litton). GE sought recovery of costs incurred in cleaning up cyanide-based electroplating solutions and residues at a Springfield, Mo., site which it purchased from Litton in 1970. Litton is the successor by merger to Royal McBee Corporation, which, through its subsidiary, Royal Typewriter, operated a manufacturing facility at the site between 1959 and 1965. Litton continued the business until 1969 when operations were shut down. A byproduct of the manufacturing process was cyanide-based electroplating waste which was dumped on a vacant portion of the site, which adjoins apartment complexes and retail, commercial, and manufacturing properties.

After a four-day bench trial, the district court found Litton liable for all response costs incurred by GE. 715 F. Supp. 949. The court also awarded GE prejudgment

interest and attorneys' fees. In so doing, the court rejected Litton's argument that GE's public participation activities were not consistent with the NCP and, thus, that its costs were not recoverable in accordance with Section 107(a)(4)(B) of CERCLA.

In its opinion, the district court found that there was no evidence that GE had dumped any waste containing the chemicals later found to be the source of contamination. 715 F. Supp. at 951. The court found that GE had worked with the State to develop a remediation plan, entered into an administrative consent decree under State law, and conducted and financed the cleanup. *Id.* at 951-954. Although GE gave Litton early notice of its CERCLA claim, Litton chose not to participate in the remediation effort. *Id.* at 952.

The court addressed in summary fashion each element of CERCLA liability and found Litton liable. In particular, based on GE's close cooperation with state authorities, the court found that GE's public participation activities were "consistent with the NCP." *Id.* at 961 and 963. For example, in rejecting Litton's challenge to GE's recovery on the ground that GE failed to comply with the public hearing requirement of the NCP, the court found that GE implemented a removal action consistent with the NCP and Section 300.65 (*id.* at 960 and 961), and that GE's "compliance with legally applicable or relevant and appropriate state requirements provides a substantially equivalent opportunity for public involvement," *id.* at 961. Furthermore, the court stated that "if notice to the public is a requirement, the input of the Missouri Department of Natural Resources serves as a substitute for public comment." *Ibid.*

The court rejected Litton's defense that GE should be barred from recovering because of unclean hands. *Id.* at 955. Litton had argued that GE should be barred from recovering because several years after discovery of the

contamination, but before the cleanup, GE agreed to sell the site to a third party, allegedly without disclosing Litton's dumping. The court held that the principle of unclean hands was inapplicable to the facts because Litton was not injured or prejudiced by GE's alleged improper conduct. *Ibid.* In *dicta*, the court also stated that it is "doubtful" whether the doctrine is applicable in CERCLA cases. *Ibid.*

Finally, the court disposed of Litton's argument that the "Collateral Benefit Rule" should bar GE from benefiting by having Litton pay for the cleanup because, allegedly, GE knew about the dumping when it purchased the site in 1970. *Id.* at 963. The court ruled that the evidence failed to support Litton's argument that the property was being used as a dump when GE bought it, or that GE could have seen such dumping activities since they were not visible from the plant.

This appeal followed.

STANDARD OF APPELLATE REVIEW

The questions (1) whether GE, removing hazardous waste from a particular site, satisfied the prerequisites for a private recovery of response costs under CERCLA, as specified in the "National Contingency Plan" adopted by the Environmental Protection Agency, including any applicable public participation requirements, and (2) whether the defense of unclean hands bars private recovery actions under CERCLA, are both issues of law reviewable *de novo* in this Court. *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988), cert. denied, 109 S. Ct. 1121 (1989).

ARGUMENT

I

THE 1985 NATIONAL CONTINGENCY PLAN DOES NOT SPECIFICALLY REQUIRE THAT PRIVATE PARTIES PROVIDE FOR OPPORTUNITIES FOR PUBLIC COMMENT IN FORMULATING AND IN CONDUCTING A "REMOVAL" ACTION

As an initial matter, it is important to decide whether GE conducted a "removal" or "remedial" action. The distinction is important because, as we have explained (*supra* at 9), GE's compliance with the NCP's public participation requirement is relevant only if GE's response action was, in fact, a remedial action.

The district court explicitly found that "GE's action was consistent with the NCP as a removal action" (715 F. Supp. at 960) and stated further that "plaintiff implemented the removal action consistent with § 300.65 [which governs removal actions]" (*id.* at 961), strongly suggesting that the district found the action to be a removal. Further, the action was "short-term," as it was completed in less than 2 months (*id.* at 953) and at a cost (with interest) of approximately $1 million (*id.* at 963). Indeed, the court concluded that "no public hearing was required due to the fact that GE was complying with legally applicable or relevant and appropriate state requirements *that the waste be removed.*" *Id.* at 961 (emphasis supplied). However, at the same time, the court found that GE provided a "site investigation and analysis of remedial alternatives as required under 300.68 [which governs remedial actions]," *Id.* and the court also discussed at length the requirements of 300.68. *Id.* at 961-62. This raises some question as to whether the

district court firmly decided if GE's action was a removal or a remedial action under CERCLA.[7]

Overall, the court's findings of fact suggest that the record would support the conclusion that GE conducted only a "removal" action. ("Court finds that GE's action was consistent with the NCP as a removal action" 715 F. Supp. at 960, and "[i]t is clear to this Court that plaintiff [GE] implemented the removal action consistent with § 300.65" *id.* 961.) As set forth above, if GE's response at the site was a "removal" action, the 1985 NCP sets forth no specific requirements for public comment opportunities (except to the extent such opportunities are required by ARARs and are practicable). 40 C.F.R. 300.65.[8] Thus, if GE's action was a "removal" under the 1985 NCP, then the court's discussion of GE's compliance with the NCP's public participation requirement may be presumed to be *dicta*, in response to Litton's claims, and is not necessary to the court's holding. (Note that Litton's brief clearly treats GE's action as remedial, subject to the full panoply of procedures mandated by § 300.68.)

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[7] We note that a Remedial Investigation/Feasibility Study (RI/RS) was performed at the GE site. Such studies generally precede remedial actions, although in many cases a removal may be performed based on finding in an RI/FS. Also, soil removal can be an appropriate action to be taken in the context of a remedial action. 40 C.F.R. 300.68(j)(3).

[8] See footnote 6.

II

COMPLIANCE WITH STATE REGULATORY PROVISIONS PERTAINING TO THE CLEANUP OF A HAZARDOUS WASTE SITE SATISFIES THE "PUBLIC PARTICIPATION" REQUIREMENTS OF THE 1985 NCP FOR A "REMEDIAL" ACTION ONLY IF THE STATE REGULATORY PROVISIONS PROVIDE FOR A SUBSTANTIALLY EQUIVALENT OPPORTUNITY FOR PUBLIC INVOLVEMENT IN THE CHOICE OF THE "REMEDY"

Assuming, however, that GE's response constituted a "remedial" action, the United States regards as troubling the court's conclusion that no public comment was required because GE was complying with legally applicable or relevant and appropriate state requirements (ARARs) "that the waste be removed." *Id.* at 961.

If GE's action were a remedial action no public hearing would have been required if GE had been complying with ARARs that "provide[d] a substantially equivalent opportunity for public involvement in the choice of remedy." 300.71(a)(2)(ii)(D). Compliance with a substantive ARAR governing the extent and results of remedy action, however, does not necessarily satisfy the public participation requirement of the NCP. The district court's statement could be read to suggest that such substantive compliance would be sufficient, since it refers to the ARAR standard for remedial actions.[9] The district court may have concluded, *sub silentio*, that compliance with one or more ARARs provided "substantially equivalent" opportunities for public involvement, but the opin-

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[9] The court's statement may also be read to reflect a finding that no public hearing was required because the state requirement "that the wastes be removed" identifies GE's response as a "removal" action.

ion lacks such an analysis.[10] The United States submits that compliance with a state ARAR satisfies the public participation requirements of the 1985 NCP for a remedial action only if that ARAR includes procedural provisions that afford "substantially equivalent" opportunities for public involvement. The district court's opinion here does not show how compliance with a specific state ARAR with procedural elements afforded "substantially equivalent" opportunities for public participation and thus satisfied the requirements for remedial actions in the 1985 NCP.

The district court's additional statement that the State's input in the remedy selection "serves as a substitute for public comment," is, in the view of the United States, erroneous. The United States submits that a private party taking remedial action must either provide some opportunity for public comment on the alternatives from which a remedial action will be selected, or comply with a state or local ARAR that includes substantially equivalent opportunities for public participation in the selection of the remedy. The involvement of the state is simply not a substitute for public participation rights.[11]

Of course, even assuming that GE's response was indeed a remedial action, the record in this case may well support the conclusion that there was substantial compliance with the public participation requirement. For example, the opinion indicates that the State Hazardous Waste Commission held three meetings in which the GE

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[10] There are findings of fact showing public participation (see, *e.g.*, finding 20, *id.* at 952), but these findings are not referenced in the public participation discussion.

[11] Recently, for instance, in *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784 (D. N.J. 1989), the court rejected the contention that the participation of state and local officials, and the participation of the state environmental agency in the standard-setting process obviated the need for a public comment period. *Id.* at 801.

site was discussed. *Id.* at 952. The district court found that these public hearings were held "both before and during the course of the cleanup at the site[,]" that public notice was provided, and that the public attended the meetings. *Id.*[12] Litton cannot convincingly assert that the public was not involved in the cleanup process in the face of the court's finding that changes in the response actions were made because of "local publicity." *Id.* at 954. If the public had an opportunity to discuss the remediation plans at these hearings, then GE's response actions may well have been consistent with the public participation requirements of the 1985 NCP, even those for remedial actions.[13] If this was indeed the case, then the federal government's concerns about sustaining the integrity of the public participation process would be satisfied.

III

UNCLEAN HANDS IS NOT AVAILABLE AS A DEFENSE IN CERCLA PRIVATE PARTY ACTIONS

While Litton does not directly raise the defense of "unclean hands" in its opening brief, it did so below, and here it attacks GE's motives and tactics in this controversy. It is thus worth pointing out that "unclean hands" is not an available defense to *liability* in a CERCLA cost recovery action under Section 107(a), al-

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[12] In addition to the fact that public meetings were held to discuss the GE site, the district court specifically found that Litton was directly advised of GE's potential CERCLA claims *prior* to the time that they were incurred, but chose not to cooperate with GE in negotiating with regard to the cleanup (an issue which Litton's brief on appeal does not address). *Id.* at 952 and 954. Thus, Litton clearly had an opportunity to participate in the response action, and no other member of the public has asserted a denial of a similar opportunity for involvement. Litton's notice of GE's actions, while not determinative of GE's compliance of the NCP's public participation requirements, is arguably a factor to be considered in allocating the parties' equitable shares of response costs.

[13] We have been advised that no transcripts were made of these state commission meetings.

though the courts may equitably allocate response costs as they determine to be appropriate when both plaintiff and defendant are liable entities and the suit is thus for contribution. *Smith Land & Improvement Corp.*, 851 F.2d at 88-89. The district court properly rejected Litton's unclean hands argument: CERCLA is a strict liability statute, *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir 1985); *U.S. v. Aceto Agricultural Chemical Corp.*, 872 F.2d at 1377. The statute, in Section 107(b) allows only a limited set of defenses against liability, 42 U.S.C. 9607(b). Equitable defenses, such as "unclean hands," are not among the defenses Congress authorized in Section 107(b). However, it may be apropriate for a court to consider equitable defenses similar to unclean hands in apportioning costs under CERCLA Section 113(f). See *Smith Land & Improvement Corp., supra.*

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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(3)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.
and LITTON INDUSTRIES, INC.,

Petitioners

v.

GENERAL ELECTRIC COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Litton respectfully submits this Reply Brief[1] in response to GE's arguments concerning the nationally significant attorneys' fee question which has divided the federal courts.[2]

Since Congress required only a few plain words to express its clear intention to create a right to attorneys' fees in Sections 104(b) and 310 of CERCLA, the fact that GE, after several pages of strained analysis, cannot identify *any* statutory language that *explicitly* permits fee-shifting in Section 107(a) private party cost recovery actions, totally vitiates its principal argument that there is "clear textual authorization" for the Eighth Circuit's award of attorneys' fees (GE Brief, at pp. 9-12). GE cannot avoid the ineluctable conclusion that if Congress had intended to create a right to attorneys' fees on behalf of Section 107(a) private parties, it would have used the same direct and explicit language it employed in Sections 104(b) and 310.

In stark contrast to those express provisions, Section 101(25), the linchpin of GE's argument and the Eighth Circuit's holding, does not even mention attorneys' fees. This conspicuous omission is conclusive proof that Congress did *not* intend to

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1. Given the limitations applicable to reply briefs, Litton cannot here address all of the errors which pervade GE's arguments on the "removal action/remedial action" question. However, it is hardly "disingenuous" (GE Brief, at p. 8) for Litton to advocate adherence to the public participation and cost-effectiveness requirements of CERCLA which are designed to prevent unnecessarily expensive unilateral cleanups of the type performed here, which even GE concedes was non-emergent and not ordered by any regulatory authority. The fact that public participation requirements have been augmented in the 1990 NCP does not make the "removal action/remedial action" legal question less worthy of review (GE Brief, at p. 8 n. 4), but rather accentuates its importance and the continued need for this Court's guidance. Litton, therefore, will rest on the arguments asserted in its Petition.

2. The legal press has continued to focus on the Eighth Circuit's controversial ruling. *See Haz. Waste Lit. Rep.* (Andrews), at 20,490 (Feb. 18, 1991) (entire Petition for Certiorari reproduced); *Env't Rep.* (BNA), vol. 21, no. 42, at 1845 (Feb. 15, 1991); *Fed. Cont. Rep.* (BNA), vol. 55, no. 7, at 233 (Feb. 18, 1991); *Toxics L. Rep.* (BNA), vol. 5, no. 37, at 1171-72 (Feb. 20, 1991); *Inside EPA, Superfund Rep.* (Inside Wash. Pub.?, vol. V, no. 5, at 3 (Feb. 27, 1991) (lead article); *Lit. Rep.: Superfund* (Mealey), vol. 3, issue 22, at 8 (Feb. 27, 1991) (entire Petition for Certiorari reproduced); *The American Lawyer*, vol. XIII, no. 2, at 35 (March 1991).

permit fee-shifting in cases such as this because (a) Congress knew when it enacted CERCLA in 1980 that legislative authorization to depart from the established American rule and award attorneys' fees to the prevailing party was required to be "explicit", *Runyon v. McCrary*, 427 U.S. 160, 185 (1976), (b) Congress explicitly created in Section 104(b) a right for the United States to recover its attorneys' fees and (c) Congress, in amending CERCLA in 1986, created Section 310 with its explicit fee-shifting provisions *at the very same time* it added the general undefined term "enforcement activities" to Section 101(25).

Because Congress did not expressly create a right to attorneys' fees in connection with Section 107(a) private party cost recovery actions, the fact that it placed the term "enforcement activities" in a general definitional section of CERCLA is irrelevant here and cannot confer on GE statutory rights which Congress did not explicitly create or intend.[3] Since Sections 104(b) and 310 of CERCLA *expressly* create a specific right to attorneys' fees, controlling principles of statutory construction prohibit the general term "enforcement activities" from being used as a vehicle for implying the same right to attorneys' fees that Congress explicitly created elsewhere in the same statute. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

GE's alleged case support for its "textual clarity" argument is equally illusory and unpersuasive. Its so-called leading case,

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3. Contrary to GE's contentions (GE Brief, at p. 10), the statement in H.R. Rep. No. 253 that the addition of "enforcement activities" was intended to confirm *EPA's* authority to recover enforcement costs is not inconsistent with the term's placement in a section potentially applicable to both governmental and private parties. The 1986 amendment to Section 101(25) dispelled previous confusion as to whether EPA could recover its enforcement (as distinct from response) costs. The 1986 amendments also conferred on private parties, for the first time, a right to "enforce" CERCLA through Section 310 citizens' suits. Ultimately, however, the issue pressed by GE is a red herring: since Congress did not explicitly create a right to attorneys' fees in adding the term "enforcement activities" to Section 101(25), it does not matter for purposes of the present case where Congress placed the term or why it was placed there.

Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945 (C.D. Cal. 1990), states just the opposite of the proposition for which it is cited:

> "*CERCLA does not . . . expressly discuss the award of attorney's fees to a private party* [in a Section 107(a) cost recovery action] . . . . [T]his court's interpretation of CERCLA is predominately guided by congressional intent . . . . Unfortunately . . . , '*CERCLA is not a paradigm of clarity* or precision. It has been criticized frequently for unartful drafting and numerous ambiguities . . . . Problems of interpretation have arisen from the Act's use of *inadequately defined terms, a difficulty particularly apparent in the response costs area.*' " *Id.* at 950 (emphasis added; citations omitted).

The *Pease & Curren* court's conclusion that attorneys' fees should nevertheless be awarded because Congress "implicitly" provided for them even if it did not do so expressly, *id.*, amounted to impermissible judicial legislation which is irreconcilably at odds with this Court's mandate that there must be "*explicit*" congressional authorization for fee-shifting. *Runyon v. McCrary, supra.*

The only other attorneys' fee case cited by GE, *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990), was overruled *sub silentio* by the very judge who authored it just six months after it was decided. In *State of New York v. SCA Services, Inc.*, No. 83 Civ. 6402 (S.D.N.Y. Jan. 9, 1991), Judge Patterson, acknowledging "[t]he *prevailing rule* . . . that attorneys' fees are *not* recoverable as response costs in actions under §107 of CERCLA brought by private litigants" (emphasis added), held in direct contradiction of his earlier decision in *Shapiro* that CERCLA does not provide sufficient statutory authority to award attorneys' fees to a Section 107(a) private party.

In short, GE's analysis is fatally flawed because it divorces Section 101(25) from the rest of the statutory scheme and totally ignores Congress' express creation of fee-shifting rights in

Sections 104(b) and 310.[4] However, as this Court instructed in *United States Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), statutory language cannot be construed in a vacuum:

> "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . ." *Id.* at 371.

GE's myopic construction of the term "enforcement activities" produces a result that cannot be harmonized with other key provisions of CERCLA. Indeed, if, as GE argues, Congress implicitly intended to create a broad right to attorneys' fees by adding the general undefined term "enforcement activities" to Section 101(25), there would have been no need for Congress *simultaneously* to have created *explicitly* in Section 310 of the *same* statute a *duplicative* right to attorneys' fees. Because GE's hermetic reading of Section 101(25) would render superfluous the *express* fee-shifting language in Section 310, it must be rejected. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (where a "statute admits a reasonable construction which gives effect to all of its provisions . . . we will not adopt a strained reading which renders one part a mere redundancy"). By contrast, Litton's holistic interpretation is consistent with

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4. The question is not, as GE urges, whether there is anything "inherent" in the phrase "enforcement activities" which would prevent the judicial creation of a right to attorneys' fees (GE Brief, at p. 11), but rather whether there is "*explicit*" congressional authorization for fee-shifting *in the statute*. That two Ninth Circuit non-attorneys' fee cases happen to have used the term "enforcement" in *dicta* in reference to private party cost recovery actions (GE Brief, at p. 11) is not evidence of what Congress intended. What is relevant is that when Congress, mindful of this Court's directive that fee-shifting must be accomplished explicitly, added the undefined term "enforcement activities" to CERCLA in 1986, it also added Section 310 with its *express* fee-shifting language.

both the legislative history[5] and the language of CERCLA, including Section 310.

Given the exceptional importance of the attorneys' fee issue in all substantive legal areas and the confusion this issue has generated among the district courts and between the majority of the district courts and the Eighth Circuit, the granting of certiorari will not, as GE suggests, be premature. As this Court has recognized in analogous circumstances, there is no reason to delay review until another court of appeals enters the fray, as it inevitably will. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981); *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974).

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5. GE argues that H.R. Rep. No. 253, cited by Litton, is "irrelevant" because it "was attached to a bill that did *not* become law, H.R. 2817 . . . and the conference report to the bill which did become law has no such EPA-restricted language". (GE Brief, at p. 10 n. 7). However, while House Bill 2817 was superseded, it introduced the term "enforcement activities" that was reiterated in the subsequently enacted bill, and the comments concerning that term contained in the conference report to the bill which became law are not inconsistent with those contained in H.R. Rep. No. 253. Even GE's leading case, *Pease & Curren*, treats H.R. Rep. No. 253 as relevant evidence of congressional intent. 744 F. Supp. at 951.